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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-72

UNITED STATES OF AMERICA,

Petitioner,

v.

CHAS. PFIZER & CO., INC., AMERICAN CYANAMID COMPANY AND BRISTOL-MYERS COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CHAS. PFIZER & CO., INC.

The government's brief adequately sets forth the opinions below, the basis of this Court's jurisdiction, the statute involved and the procedural background of this case. We submit, however, that it does not adequately state the question presented to this Court or the facts which gave rise to the case.

QUESTION PRESENTED

As will be shown below, the government's statement of questions presented reflects a serious misconception of the

nature and grounds of the decision below. A more appropriate statement of the issue before this Court is:

> Whether the Court of Appeals properly found that errors in the conduct of the trial, and particularly in the charge to the jury, deprived the defendants of a fair trial.

STATEMENT

Nature and Grounds of the Decision Below

The Court of Appeals concluded that errors in the conduct of the trial, and particularly in the charge to the jury, "were sufficient to deprive the defendants of a fair trial" (12618a, 437 F.2d at 958).

There is no basis for the suggestion that the decision was reached by considering particular language in isolation (G. Br. 2). It was expressly based upon a "review of the entire charge" (12598a, 426 F.2d at 41) and a "review of the entire record" (12611a, 426 F.2d at 48). While each error related to a separately identifiable subject and was serious standing alone, the ultimate decision was based upon an evaluation of the charge as a whole in the light of the record as a whole. The conclusion that the defendants had been denied a fair trial was expressly stated to result from the errors "when taken as a whole" (12618a, 437 F.2d at 958).

Because of the nature of the case, the charge to the jury was of unusual importance. All of the direct evidence was inconsistent with the allegation of conspiracy. The prosecution relied entirely upon circumstantial evidence which consisted mainly of marketing practices of the companies engaged in selling broad spectrum antibiotics, data as to the economics of producing and marketing such drugs, and technical evidence as to the fermentation and recovery of antibiotics and as to procedures in the United States Patent

Office. The complexity of the evidence presented a special need for clear and even-handed analysis for the benefit of the jury. And even more important was the fact that the evidence principally relied upon by the prosecution to support an inference of conspiracy lent itself very readily to a misconception on the part of the jury that this was really a prosecution for profiteering or for misleading the Patent Office.

The charge did not give the jury adequate guidance in its difficult task. Evidence of great importance to the defendants was down-graded and, to some extent, given misleading treatment. On the other hand, the treatment of matters principally relied upon by the government created a serious risk that the jury would be improperly influenced by the inflammatory assertions of profiteering or patent fraud. The Court of Appeals concluded: "The jury thus entered upon its deliberations with its attention diverted from the real issues to patent fraud and unreasonably high prices—both inflammatory issues" (12602a, 426 F.2d at 43).

The Court of Appeals was of the view that, on the facts, this was a "close" case (12618a, 437 F.2d at 959); and the dissenting judge characterized the government's evidence as "not overwhelming" (12611a, 426 F.2d at 48). This made the cumulative effect of the errors found all the more serious.

The Court of Appeals did not reach all of the errors asserted by the defendants in that court. Many of the asserted errors which remain unreviewed were substantial and our omission of reference to them in this brief is due only to the fact that they are not necessary for a review of the actual decision of the Court of Appeals. It should be noted, however, that the majority of the court below inclined to the view that in one respect, at least, the evidence of conspiracy was insufficient to go to the jury, which would in itself require a new trial (12619a, 437 F.2d at 959).

The Issue at Trial

The basic allegations in this case were that the defendants agreed to restrict entry into the broad spectrum antibiotics market and to maintain uniform and stable prices on their sales in that market. More specifically, it was alleged that Pfizer and Cyanamid entered into such a conspiracy at meetings between their chief executives in November 1953 and that Bristol, Squibb and Upjohn joined the conspiracy at meetings between the chief executives of Pfizer and Bristol in December 1955.

There was no direct evidence to support these allegations of conspiracy. There was an abundance of direct evidence refuting them. The principals who attended the challenged meetings told in detail what the meetings were about, what was said, and what understandings were reached. These understandings were embodied in written agreements which the government conceded were entirely lawful on their face (B.P. ¶ 7, 280a; 4865a, 4966a, 5568a). The testimony was flatly inconsistent with, and included specific, factual denials of, any understandings of any kind at the key meetings or at any other time on the matters alleged in the indictment.

The theory of the prosecution was that, despite all the direct evidence to the contrary, there must have been side agreements embodying the terms of the alleged conspiracy, and that the "must have been" was to be inferred from the way the parties subsequently acted (2378-79a, 2432-33a, 4853-54a, 4855-56a, 4865-66a, 4906a). The burden of the prosecution therefore was to establish beyond a reasonable doubt that the behavior of the parties was so inconsistent with what might have been expected of businessmen, acting independently in the interests of their respective companies, as to justify the conclusion that there was indeed agreement upon the terms of the alleged conspiracy.

The position of the defendants is that the conduct of the defendants was exactly what one would expect of companies acting independently in their separate interests. There was no evidence to indicate that the conduct of Pfizer, or any other alleged conspirator, was unusual in the pharmaceutical industry or was different from what an independent competitor would have done in the circumstances. Indeed, the conduct relied upon by the prosecution was in large measure simply a continuation of policies and practices which the respective defendants had followed long before any conspiracy was alleged to have existed and which were adopted for legitimate business reasons.

A basic defect running through the whole of the government's case is its failure to distinguish between acts logically evidencing unlawful agreements or understandings and acts based upon mere prediction as to what the competition will do. No inference of wrongdoing can logically arise from the fact that a company in a market with few sellers reasonably predicts that others will probably match a price cut or seek to obtain or enforce patent rights, and thereafter bases its own strategy on such predictions. Businessmen must make such predictions and rely upon them every day. Since a company's competitors are in the same business and since a company's prosperity and very survival may depend upon the making of perceptive predictions about its competitors, one would expect such predictions often to be accurate. The mere fact that such normal and reasonable predictions made by one company with respect to competitors turn out to have been accurate does not show that the competitors agreed or conspired, expressly or by implication, that they would be accurate. *See* Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655 (1962).

SUMMARY OF THE FACTS

A. The Alleged Conspiracy to Exclude Competition.

There is no dispute that during the period alleged in the indictment Pfizer, Cyanamid and Bristol were the only manufacturers of tetracycline, that the five alleged co-conspirators were the only sellers of tetracycline products, and that (with one exception) there were no bulk sales of tetracycline except those by Bristol to Squibb and Upjohn. However, these facts alone do not establish that the market situation was the result of conspiracy. The question for the jury was whether additional evidence justified an inference beyond a reasonable doubt that this market situation resulted from conspiracy.

1. Evidence Relating to the Settlement Between Pfizer and Cyanamid.

a. Pfizer's Entry into the Broad Spectrum Market.

Broad spectrum antibiotics were revolutionary discoveries of the late 1940's and early 1950's. These drugs—Aureomycin, Chloromycetin, Terramycin and tetracycline—

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* There were two principal phases of the government's allegations and of the evidence at trial. In connection with each of the three counts of the indictment, the government tried to prove that the defendants conspired to exclude others and that they also conspired to fix prices. Some of the evidence primarily related to the conspiracy-to-exclude charge and other evidence primarily related to the conspiracy-to-fix-prices charge. The case was tried on the theory (and the jury was instructed) that the jury could convict on each count if it found that *either* type of conspiracy was proven (4955a, 4964-65a, 4998a). The verdict was a general one, and it can never be known which conspiracy the jury found. In such a situation a new trial on all three counts is required if error was committed in the trial of either of these conspiracy charges. *Nash* v. *United States*, 229 U. S. 373, 379-80 (1913); *Patterson* v. *United States*, 222 F. 599, 650 (6th Cir.), *cert. denied*, 238 U. S. 635 (1915); *see also Haupt* v. *United States*, 330 U. S. 631, 641, n. 1 (1947).

were remarkably successful products from the moment of their introduction.

Aureomycin was first introduced by Cyanamid in 1948, and was followed in 1949 by Chloromycetin, produced by Parke, Davis. Both of these products were patented. Cyanamid, which held the Aureomycin patent, did not license others and was the sole seller of that product. Parke, Davis, which held the patent on Chloromycetin, followed a similar policy and was the sole seller of that product.

Pfizer introduced Terramycin in 1950, and in doing so entered the business of pharmaceutical marketing for the first time. Until 1950, Pfizer was not regarded as a pharmaceutical house at all; it offered nothing to wholesale or retail druggists, to hospitals or to the medical profession. It had begun the manufacture of finished medicinal products during World War II, but sold only to other manufacturers and the government until 1950. Its name was virtually unknown to the drug trade, hospitals or physicians, and it had none of the large-scale apparatus necessary for the marketing of prescription drugs (2354-56a, 2434-36a, 2541-45a).

The discovery of Terramycin in 1949 provided the opportunity for breaking into the field of pharmaceutical distribution. However, this opportunity carried with it a great risk because large expenditures would be needed to build and maintain an effective sales organization, and Pfizer would, in effect, be gambling on the success of its one product. Moreover, Pfizer would be entering into competition with old and well-established firms having established good will among physicians, broad product lines, extensive research programs spanning a variety of fields, superior distributional and sales facilities, and established managerial organizations. Pfizer had none of these advantages (2356-57a, 2545-49a).

Pfizer's management decided to take the risk and enter the pharmaceutical business. At the same time they made

two other decisions. First, they concluded that, since the company would be relying so heavily on Terramycin as its vehicle for market entry, this product should be maintained as a Pfizer specialty, with no licenses or bulk sales to other manufacturers (2357-58a, 2387a, 2435a, 2548-49a, 2659a). Second, they determined that other drug products would have to be found which could take their place with Terramycin as Pfizer specialties, thus broadening and strengthening the company's product line (2355-59a, 2549a).

b. Discovery of Tetracycline.

Pfizer scientists promptly began research for the discovery of new drugs. A result of this program was the discovery of tetracycline by Dr. Conover, a Pfizer scientist, in June 1952 (2359a, 2554a, 2562a). A patent application for both product and process claims was filed in October of that year (GX6, 7535-42a).

Pfizer was not then able to proceed with the commercial manufacture of tetracycline. The only process known to the company for making that drug was the deschlorination of Aureomycin, a chemical process by which the molecular structure of Aureomycin was changed and a new and different chemical compound was created. Since this process required the use of Aureomycin, on which Cyanamid held both product and process patents, Pfizer could not engage in the manufacture of tetracycline without either a patent license or a supply of bulk materials from Cyanamid. Pfizer tried to get around this obstacle by searching for a means of manufacturing tetracycline by direct fermentation, but this effort was unsuccessful (2359-64a, 2554-60a).

c. Pfizer Becomes Aware of Cyanamid's Patent Application.

In October 1952, an article was published by Pfizer scientists in the Journal of The American Chemical Society,

which showed the chemical formula of tetracycline and its relation to the chemical structures of both Aureomycin and Terramycin (2766a, 2769-70a). This article led Cyanamid scientists to begin work which resulted in their production of tetracycline by the deschlorination of Aureomycin. Cyanamid applied for a product and process patent in March 1953, five months after Pfizer's application (2560-61a, 2759-60a; GX5, 7455-83a).

In the summer of 1953, Pfizer became aware of Cyanamid's progress toward commercial production of tetracycline. By this time, Cyanamid had produced substantial quantities of that drug and was engaged in clinical testing in a number of hospitals throughout the country. Pfizer's first information of this activity came through its salesmen, who learned of it in their calls upon hospitals (2361a, 2448-49a, 2554-56a). Then in October 1953, at an antibiotics symposium sponsored by the Food and Drug Administration, Cyanamid scientists presented papers describing the successful results of clinical testing of tetracycline. These revelations made it apparent that tetracycline was soon to be placed upon the market by Cyanamid. They also showed that Cyanamid scientists regarded tetracycline as superior to Aureomycin, which had begun to show some serious defects (2361a, 2449a, 2557a, 2723-24a).

In late October 1953, Pfizer received from the Patent Office a Notice to Copy Claims, indicating the imminence of an interference proceeding with respect to Pfizer's application for a tetracycline patent (GX4, 7392a). Because of articles published by Cyanamid scientists and the known facts as to Cyanamid's progress towards commercial production of the drug, Pfizer had little doubt that the other party to the interference had to be Cyanamid (2361-64a, 2447-49a, 2557-59a).

Pfizer was in a difficult position, despite its firm belief that it held priority of invention (2448a, 2560-62a, 2723-24a).

If the threatened interference was litigated, issuance of a patent on tetracycline would be delayed indefinitely. Pfizer would thus have no legal basis to prevent Cyanamid's exploitation of Pfizer's discovery (2559-60a, 2724a). Moreover, Pfizer would be blocked from producing tetracycline itself, even if it ultimately obtained the tetracycline patent, unless it could make or buy the necessary quantities of Aureomycin. This it could not do without some contract with Cyanamid, the holder of the Aureomycin patent (2364a, 2554a, 2559-60a).

d. Settlement of the First Interference.

At this point, Pfizer's management decided to enter into negotiations with Cyanamid. This was a logical and rational decision because it was the only way of overcoming the patent block which Pfizer faced.

Settlement was equally logical from Cyanamid's point of view. Since Cyanamid had already asserted to the medical profession that tetracycline was superior to its own product, Aureomycin, the risk that Pfizer might establish priority was particularly serious for Cyanamid. This risk loomed large, since Cyanamid was aware that its work on tetracycline had been begun only after Pfizer's publication of scientific information about that drug, and had been prompted by that publication (2769-72a, 2805-07a).

Two meetings between the companies were held in November 1953. These were the meetings at which the government claimed that Pfizer and Cyanamid formed the alleged conspiracy to exclude competitors and fix prices (B. P. ¶¶ 2, 9, 27(a), (d)-(f), 278a, 281a, 298-300a, 1106-07a, 1130-31a, 1482a, 1484a, 1495-96a, 4520-21a, 4829-31a, 4853-54a, 4866-67a, 4872-73a, 4999-5000a).

On the first occasion, John E. McKeen, Pfizer's President, went to see Wilbur G. Malcolm, Cyanamid's President, at the latter's office (2284a, 2393a, 2449-51a, 2452-53a, 2767a).

This meeting was preliminary in nature. McKeen outlined the general basis of a settlement which Pfizer would be willing to accept to enable that company to begin the prompt production and marketing of tetracycline. Malcolm indicated that he was willing to consider a settlement. It was left that the parties would think about the matter and meet again in a week or two (2284-85a, 2393a, 2450-52a, 2564-66a, 2767-72a).

At the second meeting, McKeen was accompanied by John J. Powers, Jr., a Pfizer vice president, and Malcolm was accompanied by George E. Martin, a Cyanamid vice president. The terms of a settlement were discussed in detail and an agreement in principle was reached. The terms agreed upon included:

1. Settlement of the interference in the usual way. This would involve an exchange of proofs of priority and a concession of priority by the party shown to be later, or, failing such concession, an early submission of the proofs to the Patent Office for binding determination as to priority without appeal from the decision of the Board of Patent Interferences.

2. An undertaking that the winning party to the interference would grant to the losing party a non-exclusive license to make, use and sell tetracycline under any patent that would issue to the winning party on the pending applications.

3. A non-exclusive license from Cyanamid to Pfizer under the former's Aureomycin patents to make that product for use in the manufacture of tetracycline, and the know-how and culture necessary to make the license effective.

4. The sale by Cyanamid to Pfizer of enough bulk tetracycline to enable Pfizer to get into the marketing of tetracycline while it was setting up its own procedures for the manufacture of Aureomycin and its conversion into tetracycline (2302-03a, 2396-97a, 2454-58a, 2772-73a).

These terms were reasonably related to the business objectives of each party and to the relative negotiating strength of each. In retrospect, it is difficult to see how either party could have been expected to agree to a settlement significantly different from that actually made.

As had been foreseen, the Patent Office declared an interference between Pfizer and Cyanamid on December 28, 1953 (GX7, 7556a). On January 11, 1954 the oral agreements were reduced to writing (GX's 53-54, 8527-60a). The companies promptly exchanged proofs of priority, and it was concluded that Pfizer had priority of invention, a decision not disputed by the government. After a concession of priority was filed by Cyanamid, the first interference was dissolved in February 1954 (2310-12a; GX7, 7561-62a).

The government conceded before trial that the above agreements were completely lawful in and of themselves (B.P. ¶ 7, 280a). Its theory at trial was that something else was agreed to between the parties in addition to what is referred to above. It claims here that the settlement formed part of a pattern evidencing such an understanding (G. Br. 13). There is nothing in the facts concerning the settlement, however, which suggests that there was anything other than the normal working out of a patent conflict, with each company driving the best bargain it could.

The government asserts that, since tetracycline was going to have a great impact on the broad spectrum antibiotics market, this gave Pfizer and Cyanamid a motive to conspire to exclude others from tetracycline (G. Br. 8-9). However, this suggested motive is not borne out by the facts. The record shows that Pfizer was confident from the beginning that it would get the patent on tetracycline and use it to help build Pfizer's pharmaceutical business (2318-19a, 2554a, 2558-62a). From the Notice to Copy Claims, it understood that its tetracycline claims were allowable (2315a, 2558-59a). And it was confident of its priority

over its rival Cyanamid (2560-62a). As the government admits (G. Br. 13), Pfizer "justifiably believed" that it would receive a patent on tetracycline early in 1954. To suggest that Pfizer had a motive to conspire because it considered tetracycline a promising new product as to which it had a strong patent position is simply unjustified.

The government's contention that there was something unusual about the settlement appears to be based in large part on the agreement that Cyanamid would sell a substantial quantity of bulk tetracycline to Pfizer. In part, the government argues that, since this transaction enabled Pfizer to accelerate its entry into the tetracycline business, there was something suspicious about it. The uncontroverted fact, however, is that Malcolm was afraid, and McKeen believed, that Pfizer's position as to priority of invention was stronger than Cyanamid's (2448a, 2560-62a, 2723a, 2769-72a 2773a, 2805-06a). Moreover, as events later proved, Cyanamid could sell bulk to Pfizer and still gain the competitive advantage of being the first to market tetracycline (1785-86a, 2289-90a, 2825-27a; Ct.X 4, 6848-49a). In such a situation it would have been strange if McKeen had not insisted upon arrangements permitting Pfizer's prompt entry into the market, and it would have been foolhardy for Malcolm to have prevented a settlement by stubbornness on that point.

The government has also argued that there was something suspicious about the fact that these sales were not pursuant to a written agreement. Although the other provisions of the patent interference settlement were embodied in the agreements executed on January 11, 1954, the bulk sales transactions were covered by purchase orders and invoices (GX's 285-95, 644, 8785-95a, 8972a). This was the normal procedure for short-term sales of bulk materials (2383a), and it was especially appropriate here because Pfizer demanded that deliveries of bulk tetracycline begin at

once and not await the execution of formal agreements on other matters (2451a).

In addition to arguments made on the basis of the bulk sales, the government also argues that a public statement made by McKeen to the Security Analysts Society of New York on January 29, 1954, indicated that Pfizer and Cyanamid had reached an agreement to exclude competition (G. Br. 14). The statement alleged to support this inference was made during a question and answer period following prepared remarks delivered by Pfizer's officers and directors to the Security Analysts who had met at Pfizer's Brooklyn plant to analyze the company's prospects. McKeen was asked by one of the visitors whether Pfizer was planning to license Bristol if it received a patent on tetracycline. He replied that Pfizer did not then intend to grant any licenses beyond the one required by the interference settlement (2319-27a, 2484-85a). The policy stated made good business sense for Pfizer irrespective of what any other company might do. Therefore, neither the policy itself, nor McKeen's willingness to state it in response to a question from a security analyst, tends to prove anything about conspiracy.

2. Facts as to Proceedings in the Patent Office.

a. Bristol Causes a Second Interference.

In September 1953, after both Pfizer and Cyanamid had published scientific articles relating to tetracycline, Bristol reexamined the results of its previous research and found that one of the substances which had been produced, but which had not been identified or isolated, appeared to be tetracycline (2874-76a, 3094-95a). After Bristol had seen the Pfizer and Cyanamid publications, it put together an application for a tetracycline patent, filed on October 19, 1953 (3085a). Since this application was filed more

than one year after the October 1952 publication by Pfizer scientists, the claim to tetracycline was barred (2914a, 3085a; GX9, 7713-16a).

After the rejection of this application, Bristol filed a "continuation in part", abandoning claims to tetracycline as such, but claiming separate patentability for tetracycline hydrochloride (3011a; GX10, 7887-935a). This led to the declaration of another interference in March 1954, approximately one month after the termination of the first interference between Cyanamid and Pfizer (3011a). This second interference involved Bristol, Pfizer and Cyanamid and served to delay the issuance of any patent for a number of months.

b. Positions Taken by Pfizer and Cyanamid on the Separate Patentability of the Hydrochloride Form of Tetracycline.

The government has claimed that alleged collaboration during this interference was in some way contrary to the individual interests of each company, and that this indicated the existence of a conspiracy. This argument ignores the fact that the companies were pursuing different and often conflicting objectives during this period. The record of the interference shows that eleven contested motions were made and that Pfizer and Cyanamid took positions in direct opposition to each other on eight of them (GX12, 8281-99a).

The only substantive issue on which Pfizer and Cyanamid took similar positions related to Bristol's claim for the separate patentability of tetracycline hydrochloride. Both Pfizer and Cyanamid opposed Bristol and took the position that the hydrochloride form was not separately patentable. The independent interests of each company mandated the similar positions taken on this issue. Cyanamid clearly would have been placed in a disadvantageous position had

a patent upon tetracycline hydrochloride issued to Bristol, since Cyanamid had already begun to market tetracycline products, largely in the hydrochloride form, in reliance upon the license it was entitled to receive from Pfizer. The issuance of a separate patent on tetracycline hydrochloride to Bristol would have prevented Cyanamid's continued sales of its principal tetracycline products without a further license from Bristol. Thus, Cyanamid had a clear interest in seeking to prevent this occurrence entirely apart from any hypothesis of conspiracy. Pfizer also had a clear interest in protecting its right to make use of its own discovery in the hydrochloride, as well as in other, forms.

c. Bristol's Attempts to Delay the Proceedings.

In order to obtain its patent as soon as possible, Pfizer naturally opposed Bristol's attempt to delay the proceedings through repeated adjournments. Much has been made of the fact that Cyanamid also opposed Bristol's delaying tactics. Cyanamid would not have to pay royalties to Pfizer except on sales made after Pfizer received the patent. It is argued that for this reason it would have been better off if it had joined with Bristol in seeking delay and that its failure to take this course indicates that it must have been in a conspiracy with Pfizer. However, the fact is that Cyanamid had a very good reason to oppose delay. It was very much in its interest to have the notion that the hydrochloride form was separately patentable put to rest as soon as possible before it had committed itself any further on, or gotten the medical profession any more accustomed to using, this form of the product. Early issuance of a patent to Pfizer, resulting in the beginning of Cyanamid's royalty payments, would be an insignificant price to pay for a prompt decision making clear Cyanamid's right to continue marketing tetracycline hydrochloride and thereby removing a threat to its entire tetracycline market position.

Some of the language quoted most frequently by the government in this case is from a paper filed by Harvey W.

Edelblute, Cyanamid's patent lawyer, in opposition to a Bristol motion for a delay of the proceedings and in response to a Bristol suggestion that Cyanamid might benefit from any delay obtained by Bristol. Edelblute said that Cyanamid opposed delay and would rather pay royalties to a bona fide patentee than see the market ruined by irresponsible price cutting (GX 12, 8185-87a). The claim was made that this somehow proved conspiracy.

These remarks could not tend to prove conspiracy, because they do not tend to signify any understanding between Pfizer and Cyanamid as to what either company would do. All they show is that Edelblute made a prediction as to Pfizer's future conduct—he recognized the well-known fact that it is often advantageous to be a non-exclusive licensee of a valuable patent because in such cases patentees often choose not to issue many other licenses on patented specialties. Neither this nor any other evidence shows that Edelblute knew or even suspected the existence of any express or implied undertaking between Pfizer and Cyanamid on this subject. The government failed to show why, in a non-conspiratorial situation, any patent lawyer worth his salt would have made any other prediction.

d. The Conflicting Positions of Pfizer and Cyanamid on Most Points.

On the most important issues in the second interference Pfizer and Cyanamid took positions hostile to each other. Pfizer contended that Cyanamid had no standing at all in the interference proceeding because of an estoppel arising from the settlement of the first interference. This contention prevailed and Cyanamid was, in effect, thrown out of the proceeding on Pfizer's motion (GX12, 8298-99a).

In another motion, Cyanamid sought to have the subject matter of the second interference broadened to include claims to a fermentation process for making tetracycline. Over Pfizer's vigorous objection, Cyanamid sought to have Pfizer excluded from the proceeding relating to these claims

by having any exchange of information take place only between Cyanamid and Bristol (GX12, 8126-29a, 8194-95a). This was certainly not cooperative conduct; and it should be noted that the fermentation counts pressed by Cyanamid were in large part the source of the information upon which the examiner later speculated as to co-production of tetracycline in the production of Aureomycin (GX12, 8293-94a).

All of the evidence relating to the second interference shows that each company was striving to advance its own interests, without regard to the effect that its position might have on the other. Rather than supporting any inference of conspiracy, such unilateral and independent acts tend to negate any understanding between the companies on any terms of an alleged conspiracy.*

e. Evidence of Alleged Patent Fraud.

In October 1954, the patent examiner dissolved the second interference and, reversing his earlier position, ruled that tetracycline itself was not patentable because of his speculation as to co-production of tetracycline along with Aureomycin by the prior art processes of the Aureomycin patents issued to Cyanamid (GX12, 8293-94a, 8299a). Upon this ruling Pfizer's Conover application was returned to *ex parte* prosecution and neither Bristol nor Cyanamid had any further part in it. A large part of the government's evidence had to do with the proceedings during the *ex parte* prosecution and involved an attempt to prove that Pfizer was guilty of unilateral fraud which led to issuance of the Conover patent in January 1955.

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* In the Court of Appeals the government based a suggestion of illicit cooperation between Pfizer and Cyanamid on the fact that Pfizer's attorneys expedited the handling of a brief filed by Cyanamid within the Patent Office. However, what the evidence shows is that Pfizer was served with a Cyanamid brief which took a position on a motion similar to that taken in a brief previously filed by Pfizer and that, after seeing the Cyanamid brief, Pfizer saw to it that the examiner had a copy of it before he decided the motion (3671-77a).

Pfizer continues vigorously to deny that it committed any fraud or other misconduct in the Patent Office. However, for purposes of this case, it is not material whether the charges of fraud were supported. Pfizer's unilateral steps in prosecution of the patent application had no probative value on the issue as to whether Pfizer and Cyanamid had conspired to exclude competitors from the manufacture and sale of tetracycline. The fact that Pfizer wished to obtain a patent and was proceeding vigorously to that end is undisputed. The steps which Pfizer took in the Patent Office would have no evidentiary value unless these steps themselves were a matter of conspiracy, and the government has conceded that it has no evidence that Pfizer and Cyanamid conspired to commit a fraud on the Patent Office (4135a).

During the second interference Cyanamid made statements to the effect that no tetracycline had been produced in its prior art Aureomycin production. The government asserts that these statements were untrue and makes much of the fact that in the *ex parte* proceedings Pfizer referred the patent examiner to these Cyanamid statements (G. Br. 17). However, there is no evidence that Pfizer had anything to do with Cyanamid's making of them or that Cyanamid knew anything about Pfizer's use of them until after the patent issued to Pfizer and the record of Pfizer's *ex parte* proceedings became public. Under these circumstances Pfizer's use of these references proves no more than that Pfizer was doing all it could to marshal the authorities properly available to it which supported its position in the *ex parte* proceedings.

The fact that Pfizer worked hard to obtain a patent on tetracycline does not show that it was acting any differently from the way a non-conspirator would have been expected to act.

3. The Evidence as to the Settlement Between Pfizer and Bristol, Squibb and Upjohn.

Another set of circumstances from which the government contended that the jury might infer conspiracy to exclude involved the settlement of patent infringement actions brought by Pfizer against Bristol, Squibb and Upjohn. Although the government conceded the legality of the license agreements which terminated these litigations (B.P. ¶7, 280a), it contended that Bristol's entrance into a conspiracy with Pfizer to exclude competition was indicated by the events surrounding the settlements.

a. Patent Infringement Charges Against Bristol, Squibb and Upjohn.

Bristol first began to market tetracycline under its own label in May 1954. Before its entry into the market, Bristol had incurred heavy losses, and desperately needed a new product. Tetracycline appeared to provide this potential lifesaver (1834a, 2875a, 3010-12a). In the fall of 1953, Bristol publicized its interest in tetracycline and undertook a crash program to get into commercial production (3008a).

In February 1954, Frederic N. Schwartz, President of Bristol, placed a telephone call to McKeen of Pfizer, prompted by Pfizer's declarations to the Security Analysts Society that it would issue no tetracycline licenses if it received a patent (2485-87a, 2687a, 2878-80a). In that telephone conversation, Schwartz indicated Bristol's interest in tetracycline and asked whether Pfizer would grant a license to Bristol if Pfizer received a patent. McKeen replied negatively, and said that Pfizer intended to enforce any patent which it received against Bristol or any other infringer (2329-30a, 2485-87a, 2687a, 2878-84a).

Bristol nevertheless decided to manufacture tetracycline, and it sought bulk customers. The bulk customers chosen

were Squibb and Upjohn, and the first agreements with these companies were made in September and October 1954. Shortly thereafter Squibb and Upjohn began to market tetracycline products under their own labels.

On January 11, 1955, Pfizer was issued the patent on tetracycline and it promptly filed infringement actions against Bristol, Squibb and Upjohn. These actions were instituted in the Northern District of Georgia, a district in which calendars were relatively current, in an attempt to obtain a speedy disposition on the merits. However, after nine months of litigation, the infringers succeeded in having the cases transferred to the Southern District of New York where, it was believed, they could not be reached for trial for a long time (2521-22a, 2566a, 3021-22a). By December 1955, it appeared that pretrial proceedings would still delay for many months, perhaps more than a year, the day when the cases would even reach the trial calendar (2521-22a, 3021-22a).

b. Bristol Agreements with Squibb and Upjohn.

Despite the delays which they had succeeded in obtaining, Bristol, Squibb and Upjohn were increasingly uneasy about their chances of prevailing in the infringement litigation (3088-92a). Upjohn became so pessimistic that in October 1955 its chief executive officer, Donald S. Gilmore, went to see McKeen of Pfizer to seek a separate settlement (2566-67a, 2902-04a, 3023a). No agreement was reached, but when Bristol learned of Upjohn's separate overtures, it became fearful of the loss of a major bulk customer and promptly sought a new agreement with Squibb and Upjohn (3023-29a).

The result was that in November 1955, one month before Bristol, Squibb and Upjohn are alleged to have entered into the conspiracy charged, the previously existing bulk sales agreements between Bristol, Squibb and Upjohn were

revised. The earlier agreements had provided that Squibb and Upjohn would indemnify Bristol for any damages arising out of their bulk purchases from Bristol in the event of an adverse decision in the infringement suit. The November 1955 agreements reversed these indemnity provisions and provided that Bristol would pay any infringement damages (3229a, 3239-40a; GX's 83, 108, 8639-47a, 8698-705a). In exchange for this, Squibb and Upjohn agreed to turn over the defense of the patent infringement suit to Bristol and to purchase their tetracycline requirements from Bristol for a period of three years after the litigation ended. It was agreed that these purchases might be discontinued at any time upon the reinstitution of the previously existing indemnity provisions (2893a, 2920-23a, 2946a, 3038a, 3229-34a; GX's 83, 108, 8639-47a, 8698-705a).

Squibb and Upjohn additionally agreed, in large part because of Upjohn's anxiety for a settlement, to pay half the cost of settlement if Bristol succeeded in terminating the Pfizer litigation within six months, and if the settlement included a license giving to Squibb and Upjohn at least the right to purchase, use and sell tetracycline to the drug trade (2922a, 3027-28a, 3033-35a; GX's 83, 108, 8639-47a, 8698-705a). All this occurred at a time when there is no claim of any conspiracy between Pfizer and either Bristol, Squibb or Upjohn.

c. Settlement of the Infringement Litigations.

Final settlement of the infringement litigations was hastened by Bristol's threat to raise a defense of unclean hands based on the fact that a private detective hired by Pfizer had been convicted of wiretapping directed against Bristol and Squibb (2516-19a, 2633-35a, 2732-33a). Although in the wiretapping case there was no charge or evidence that Pfizer had authorized the wiretapping, Bristol's threat

raised the spectre of adverse publicity and additional delay in the litigation. Pfizer, already disenchanted by the delays which had occurred and the demands which the litigation placed on its employees, agreed to discuss settlement (2515-24a, 2634-35a, 2888-89a).

Discussions took place on December 14 and 15, 1955, with McKeen and his patent attorney representing Pfizer, and Schwartz and the patent attorney for Bristol, Squibb and Upjohn representing the infringers (2515-29a, 2571-72a, 2632-33a, 2888-90a, 2919-20a). These meetings resulted in a settlement.

Under the settlement Bristol received a non-exclusive license to make, use and sell tetracycline (GX50, 8480-500a). In accordance with the terms of Bristol's earlier agreement with Squibb and Upjohn, it obtained for them non-exclusive royalty-bearing licenses to purchase, use and sell tetracycline to the drug trade (GX's 51-52, 8501-62a). Before these licenses were signed, McKeen of Pfizer double-checked with officials of both Squibb and Upjohn to make sure that the terms were satisfactory to them, and was told that they were (2570-72a; PX607, 12529a).

The McKeen-Schwartz meetings are claimed to have been the occasion when Pfizer began to conspire with Bristol, Squibb and Upjohn. However, these settlements were no more than a normal and straightforward compromise of hotly contested litigation. By suing for infringement on the day the patent issued, Pfizer had shown that it had no hesitation in putting the validity of its patent to a court test. The infringers, after strenuous efforts to find a basis for a claim of invalidity, had become doubtful about their chances of success. The fact that parties so situated decided to settle their controversies provides no logical support for an inference that the settlement included any additional side deals such as the terms of the alleged conspiracy.

Although the government admits that the licenses to Squibb and Upjohn were in themselves completely lawful,

it contends that there is something suspicious about the fact that they granted Squibb and Upjohn only the right to purchase, use and sell to the drug trade. However, the undisputed facts show that no suspicion of conspiracy can arise from that fact. The agreements by which Bristol was granted the power to negotiate licenses on exactly those terms were executed in November 1955, more than a month before Bristol, Squibb or Upjohn were alleged to have entered into any conspiracy, and Pfizer had nothing to do with those agreements. All that was shown was that Pfizer acceded to the demands of the settlement representatives of Squibb and Upjohn and granted the licenses sought by the three infringers (2529a, 2919-20a, 2924-25a, 3042a). No restrictions were contained in these lawful licenses, and Pfizer remained free to issue similar or broader licenses to any other corporations, including Squibb and Upjohn. The government has never offered any reason why a non-conspirator in Pfizer's situation would be expected to grant licenses broader than those demanded by its adversaries as a price for settling.

4. Evidence as to Failure to Grant Licenses or to Sell in Bulk.

None of the companies issued any licenses or made any bulk sales apart from the licenses issued in the settlement of controversies and the bulk sales by Bristol to Squibb and Upjohn and by Cyanamid to Pfizer. The failure to do so was relied upon by the government as evidence justifying an inference of conspiracy not to do so.

However, no reason was ever brought forward indicating why any of the companies would have been expected to operate differently in the absence of a conspiracy. This is not a case where any company had previously followed a course of licensing or bulk sales and then departed from that policy. Nor is it a case where the independent self-

interest of any company would have been served by following any different course.

This is especially true in regard to Pfizer, which had made the policy decision not to sell in bulk or grant licenses when (long before any alleged conspiracy) it decided to enter the pharmaceutical business. The fact that Pfizer followed this independently chosen course, except where special circumstances required departure, does not prove in any way the existence of a conspiracy. There was no evidence that the policies or practices of any of the companies were unusual, either for them or for the pharmaceutical industry in general. Indeed, it was shown that Parke, Davis, the second largest manufacturer in the broad spectrum antibiotic field and a concededly innocent party, had followed exactly the same policies, issuing no licenses whatsoever and making no bulk sales (Ct. X4, 6691-97a).

After all the evidence on these subjects was in, the trial court brought up a new point, which had never been advanced by government counsel. It was suggested that an inference of conspiracy might be drawn from the fact that Pfizer did not try to sell bulk tetracycline to Squibb and Upjohn after the settlement whereas McKeen had been willing to discuss the sale of bulk to Upjohn as a means of settlement when the question of compromise was first raised by that company. The short answer is that the factual premise that Pfizer never tried to make such sales was never proved and that no attempt was made by the government to do so. Before an inference could be drawn from the fact of failure to offer bulk to these companies, the fact of such failure would have to be shown by evidence. Perhaps because this was not a part of the government's theory of the case, it produced no evidence on the point.

B. The Alleged Conspiracy to Fix Prices.

The second phase of the conspiracy charge was that the defendants conspired to fix prices. In substance the government's accusation was that defendants' prices on their broad spectrum antibiotic products were uniform as among the companies and stable throughout the indictment period up to August 1960 and that this uniformity and stability must have resulted from agreement. Once again the government's burden was to introduce evidence showing that the defendants' pricing decisions were different from what would normally be expected of a non-conspirator in similar circumstances. This it failed to do.

Moreover, here again the direct evidence was flatly inconsistent with conspiracy. The pricing officials of each defendant and of Upjohn and Parke, Davis gave complete, consistent and unimpeached testimony as to the independent bases for their pricing decisions.* On all the evidence it is more reasonable to conclude that each company was acting of its own volition than to conclude that there was a conspiracy.

The defendants' sales of broad spectrum antibiotics were made to two broad classes of customers:

> (a) retail pharmacists and wholesale druggists, making up the *prescription market;* and
>
> (b) private hospitals, city, county and state hospitals and federal governmental agencies, making up the *hospital market.*

The price uniformity and stability to which the government points occurred in the prescription market, but not in

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* 2469-70a 2472-74a, 2477-78a, 2492-97a, 2562-64a, 2566-69a, 2576-609a, 2653-57a, 2677-79a, 2709-10a, 2713-18a, 2730-31a, 2733-35a, 2738-59a 2774-75a, 2787-88a, 2799-802a, 2981-82a, 2987-88a, 3016-20a, 3064-74a, 3081-82a, 3093-94a, 3244a, 3306-07a, 3332-33a, 3355a, 3357-58a, 3371-72a, 3385-86a, 3418-19a, 3424-27a.

the hospital market. The record contains clear and unimpeached evidence as to the differing economic characteristics of the two markets which made price cutting unprofitable in the prescription market* but profitable in the hospital market.**

1. Characteristics of the Prescription Market.

Sales by retailers to individual customers could be made only upon a physician's prescription. The effective choice of the drug to be used was that of the doctor, not the purchaser. Ordinarily, prescriptions were written for a drug by its trade name; a doctor wishing to prescribe tetracycline would not prescribe it by a generic name but would prescribe the particular brand name under which a company sold that product. By law in most states, and by long-established practice everywhere, a pharmacist had to fill the prescription precisely as it was written and could not, without specific permission of the physician, substitute one brand of drug for another.

In this market, therefore, the retailer had virtually no control over which company's product would be used by the patient (1574-75a, 1831-32a, 2752-54a, 3067-68a). A retailer or wholesaler could gain no advantage by buying a lower priced brand unless the doctors were favoring it, and a manufacturer could gain no advantage from cutting its price to such a customer.

Another basic fact was that the overall usage of broad spectrum antibiotics was governed by the incidence and nature of disease, not by price. If a physician thought a patient needed a broad spectrum antibiotic, he would pre-

* 2437-41a, 2477-78a, 2549-54a, 2576-77a, 2733-35a, 2746-49a, 2751-52a, 2753-55a, 2757-58a, 3064-67a.

** 2586-93a, 2750-54a, 3065-69a, 3246-48a; Ct.X 9, 6920-36a; Ct.X 11, 6943-7329a; BX's 475-76, 493, 10469-70a, 10482-83a; PX's 257-58, 12508-09a; 1782a, 1821-23a, 1831-32a, 1836-37a, 1838-39a, 2586-87a, 2588-90a, 2595-609a, 2750-51a, 3066-67a, 3246-47a.

scribe it and, at least at the price levels actually prevailing during the indictment period, he would not be deterred from prescribing a necessary drug by the problem of cost.* In economic terms, the demand for broad spectrum antibiotics, as a group of interchangeable drugs, was highly inelastic with respect to price. No company or group of companies could have expected to increase overall usage of these drugs by reductions in price (1571-72a, 1831-32a, 2553-54a, 2567a, 2751-55a).

In one respect, however, the relative prices of particular broad spectrum antibiotics or particular brands of tetracycline had an effect. A doctor who wished to prescribe a broad spectrum antibiotic often would, in choosing among these interchangeable products, consider differences in the cost to his patient in making his choice. For this reason no producer of broad spectrum antibiotics would wish to be undersold by a competitor (2437-41a, 2551-53a, 2576-77a, 2746-49a, 2754-55a).

The nature of the prescription market made pricing decisions almost immediately available to competitors. Catalogues of all drug companies were distributed to every drugstore and all drug wholesalers. There were thus over 50,000 places in the United States where the seller of any prescription drug could ascertain the prices of his competitors. The record shows that salesmen who called on retailers and wholesalers (and also those who visited hospitals) sent a constant stream of reports to their headquarters regarding pricing activities. A price reduction to a retailer, therefore, could be met before the doctors even learned of it (2553a).

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* Since the prices most frequently shown in the evidence were those for a bottle of 100 capsules, it is worth noting that it would be most unusual for any patient to have bought in those quantities. The most common prescription was for 16 capsules, which was enough, for example, for a case of pneumonia (2596-97a). So a public hospital using Pfizer's Tetracyn (its brand of tetracycline) was in a position to treat a case of pneumonia by the use of drugs costing it from $2.60 to $4.08 (Ct.X 9, 6922a ff.). At the highest known drugstore price the cost to the patient would have been about $8.00 (Ct.X 4, 6720a ff.).

A final fact bearing on the pricing of broad spectrum antibiotics was that during the indictment period they were new and amazingly effective drugs which were soon regarded by the medical profession as wonder drugs. The overall demand for these products increased steadily from 1953 through 1959, with a particularly heavy upsurge of demand in the year 1957 because of a severe epidemic of Asian flu. The overall demand (in terms of dollar sales) began to decline somewhat in 1960 and 1961, which were years of especially significant price reductions (1776-78a; Ct.X 4, 6848-53a; GX877, 10246a).

This case thus relates to a market in which the products could generally be substituted for each other, overall demand was inelastic with respect to price, relative market position might be affected by relative price, there was a limited number of sellers, secret price cuts were hard to accomplish and there was strong market acceptance. These characteristics of the prescription market made it a market in which, without conspiracy, there would be a marked tendency towards uniformity and stability of price. To the effect that this is so as a matter of economic analysis, *see e.g.*, Turner, *A Reply to Professor Galbraith*, 19 W.R.L. Rev. 201 (1968); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 661-66, 672 (1962). *See also* Due and Clower, *Intermediate Economic Analysis*, 220-29 (5th ed. 1966), where it is stated that experimentation with price increases or declines in such a market could be extremely damaging to a company's sales and profits because of possible competitive reactions, and as a consequence:

> "Seldom will they [the sellers] deliberately experiment, but will make changes only when they are reasonably certain that the new prices will be more profitable than the old." (*Id.* at 227)

See also Independent Iron Works, Inc. v. *United States Steel Corp.*, 322 F.2d 656 (9th Cir.), *cert. denied*, 375 U. S. 922 (1963).

2. Pricing History in the Prescription Market.

When Pfizer entered the pharmaceutical business in 1950, its first pricing decision had to do with Terramycin. At the time it was publicly known that Aureomycin and Chloromycetin were offered in the prescription market at identical prices. Each price reduction on one product had been promptly met by a price reduction on the other.

Because of the likelihood that a lower price would promptly be matched and the certainty that a general price reduction would not increase total sales, Pfizer had no incentive to offer Terramycin at a lower price. Instead, the company decided to experiment with a price higher than that of the competing products, hoping to maximize profitability and give Terramycin an aura of superiority (2550-52a). However, reports soon began to come in from the field that even this small differential was having an adverse effect on the promotion of Terramycin as against the earlier broad spectrum antibiotics (2552a).

In May 1950, Parke, Davis announced a reduction in the price of Chloromycetin that would have widened the differential between Chloromycetin and Terramycin. Pfizer decided to meet this price reduction. At about the same time, Cyanamid also reduced its Aureomycin prices to match the Parke, Davis reduction (2551-53a).

In September 1951 Pfizer experimented with a price reduction of 15%. This was met promptly by both Parke, Davis and Cyanamid. No competitive advantage accrued to Pfizer from its reduction, and all companies ended up selling the same overall volume of broad spectrum antibiotic products at lower prices (2437-40a, 2552-54a). From these events it was apparent that in this market price reductions were basically self-defeating. As a result, the prices of all broad spectrums leveled off at this point.

The next pricing event came more than two years later when, in November 1953, Cyanamid introduced tetracycline at the same price as that being charged for the other broad spectrum antibiotics (2748-50a). Shortly thereafter, Pfizer had to decide what prices to publish for its brand of tetracycline. The idea of going above the prevailing prices for broad spectrum antibiotics was quickly rejected; Pfizer had learned from its early Terramycin experience that this would place it at a competitive disadvantage. The idea of charging a lower price was also rejected because such a price would probably be met at once by competition and the result would simply be lower revenues. The most prudent alternative was adopted by the company; it introduced its brand of tetracycline at prevailing market levels in January 1954 (2469-70a, 2477-78a, 2576-77a).

The subsequent introductions of tetracycline by Bristol in May 1954 and by Squibb and Upjohn in the fall of 1954 were all at the prevailing prices for the broad spectrum antibiotics already on the market. These prices were not reduced until July 1960 (Ct.X 4, 6720-846a).

McKeen gave cogent reasons why Pfizer did not reduce its tetracycline prices during those years. Management believed, on the basis of the characteristics and history of this market, that a price reduction would most likely be met by competition at once, would not expand overall demand, and would therefore be self-defeating (2733-34a). Broad spectrum antibiotics were Pfizer's most important products—its biggest source of revenues and profits (PX's 637-40, 12571-81a). Accordingly, the decision by Pfizer executives not to reduce these prices was really a decision not to fly in the face of logic and reason.

General list price reductions were not only self-defeating but were costly as well because of the industry-wide practice of making shelf-stock adjustments to retailers in the event of such a reduction (2553a, 2627-28a, 3020a, 3066-67a). It was estimated that a price reduction of only 10% would

have cost Pfizer between $750,000 and $1,000,000 in such adjustments (2733-35a).

In July 1960 countervailing factors led Pfizer to make the first list price adjustment during the indictment period by reducing its prices to direct retail accounts by 15%, thereby narrowing the margin between its retailer and wholesaler prices from about 20% to 6%. A major purpose was to increase direct sales to retailers and to rely less on distribution by wholesalers (2709-15a, 3373-90a, 3418-21a), a purpose which experience had shown could not be accomplished without narrowing the spread between prices to wholesalers and retailers.

Pfizer's management did not expect to gain any competitive advantage as against other manufacturers of broad spectrum antibiotics by this price reduction because of the likelihood that the other companies would meet it at once (3389-90a, 3402-04a). In fact, the other four tetracycline companies did meet the new price within a short time. Two of them also reduced their wholesale prices by 15% (Ct. X 4, 6720-846a; 3403-05a). This had the effect of placing Pfizer at some disadvantage on sales to wholesalers, but the company could not meet this wholesale price without re-establishing the 20% margin between its retail and wholesale prices, which would have defeated the whole purpose of the reduction to retailers (3404-05a, 3426-27a).

This was the first time in the history of broad spectrum antibiotics that Parke, Davis did not meet a price reduction in the prescription market. The government has argued that this departure by Parke, Davis from its previous practice casts doubt on the evidence that a price reduction would be self-defeating because it would be promptly met. There is no merit to this contention. The history of this market indicated that it was most likely that every company would meet a price reduction because any company not doing so would be likely to suffer a loss in sales. In fact, Parke, Davis' market share declined about 25% in

the year following its failure to meet the 1960 price reductions. As to Pfizer, there is no evidence that it gained any benefit vis-a-vis the tetracycline companies by initiating this price reduction (GX 877, 10246a).

The fact of price stability in the market where no seller could have expected to gain a competitive advantage by lowering the price does not tend to show that any competitor acted "in apparent contradiction of its own self interest." See *Milgram* v. *Loew's, Inc.*, 192 F.2d 579, 583 (3d Cir. 1951), *cert. denied*, 343 U. S. 929 (1952).

3. Pricing History in the Hospital Markets.

A different pricing situation prevailed in the hospital markets. The pricing officials testified that certain characteristics of the hospital markets made it possible to gain a competitive advantage by spot price reductions and that they made reductions.

The *NPA hospitals* (private hospitals) usually did not purchase by competitive bidding. They bought from the catalogue of the seller and expected to pay the catalogue price, which throughout the pharmaceutical industry was the same as the price to retailers (2586a). In the case, however, of different brands of the same generic drug (*e.g.*, the different brands of tetracycline) a number of these hospitals operated on a formulary system under which one brand could be substituted for another (1831-33a, 3067-68a). This meant that in the case of an NPA hospital, unlike a retailer or wholesaler, a seller could gain some competitive advantage by a spot price reduction.

Such price reductions, commonly made by the use of free goods, were given in varying amounts by the different companies during the period involved (1782a, 1836-38a, 1850-51a, 2586-89a, 3065-67a, 3072-73a; PX's 257-58, 12508-09a; BX's 475-76, 493, 10469-70a, 10482-83a). This device resulted in prices to private hospitals as much as 50% below list.

The *CCS hospitals* (city, county or state institutions) usually purchased on sealed bids and in larger quantities than did NPA hospitals. On routine bids the tendency was to quote the basic price. Especially on larger bids, there were frequently lower prices, accomplished either by direct bids at less than the basic CCS price or by a special discount to a wholesaler or retailer enabling him to submit bids at less than the manufacturer's basic CCS price (2586-87a, 2588-91a). A stipulated tabulation of bids to a number of CCS buyers shows that Pfizer's first tetracycline price to CCS hospitals in April 1954 was $25.50 per bottle. By 1961 it was selling substantial quantities at prices as low as $16.25—a decline of about 36%. (Ct.X 11, 6943-7329a).

In view of the steady and substantial decline in average selling prices to CCS buyers, it is not surprising that, after all the evidence on this subject was in, government counsel made the following concession (to the court, but not to the jury):

> "[A]s far as CCS hospitals go and Federal hospitals go, we are not maintaining at this point that there was identity of prices. Obviously the evidence in the case is otherwise. Nor have we introduced any evidence indicating conspiracy in regard to the pricing level." (4533a)

This concession was not a chance remark but was a considered affirmation of the government's original plan as stated in its pre-trial brief. In that brief it was said: "The Government will not introduce any evidence to prove price-fixing as to these classes of customers [CCS and federal hospitals], nor will it contend that such existed" (1141-42a). After the defense had rested and defendants had requested that the court inform the jury about the government's position, the concession was withdrawn (5572a).

The *federal agencies* bought almost entirely on sealed bids. The principal buyer was the Military Medical Supply Agency which bought for the armed services. Other substantial purchasers were hospitals of the Veterans Administration (2593-94a). In this market it is equally clear that there were differences among the tetracycline sellers as to their marketing strategies and that average selling prices declined substantially over the indictment period (Ct.X 9, 6920-36a). The concession of government counsel, quoted above, related to federal buyers as well as CCS buyers.

One tactic used by government counsel during his summation (and also used at pp. 29-30 of the government's brief in this Court) is to point, as if it were pointing to evidence of conspiracy, to one large bid for tetracycline oral suspension to the Military Medical Supply Agency in which several of the companies quoted the same price—namely the current price being quoted by at least one of the companies to large CCS accounts (2606a). This argument is unfair and irrelevant because the separate decision of each company not to start a price war was but one incident in a long history of bids in the federal hospital market where the government admitted it had failed to prove price fixing (2606-07a).

The conduct of the defendants in the hospital markets has significance beyond the government's failure to prove price fixing in those markets. In the prescription market it was apparent to the defendants that price reductions would be self-defeating. On the other hand, in the hospital markets, where price-cutting tactics could secure large orders, such tactics were widely used and the use of such tactics varied greatly among the defendants. The pricing patterns in these markets are affirmative evidence that there was no conspiracy.

4. Evidence as to Bulk Sales by Cyanamid to Pfizer.

Another government argument related to circumstances surrounding the sale of bulk tetracycline by Cyanamid to Pfizer beginning in November 1953. In this Court the government implies that Pfizer and Cyanamid officials must have had resale prices in mind because the price Pfizer paid for the bulk was about one-third the resale value of the product and that

> "the price reflected the drug industry's rule of thumb that the gross return of a product should be three times its factory costs . . ." (G. Br. 13)

From this it was suggested that Pfizer would not have agreed to pay $3,875,000 for bulk tetracycline unless it had an understanding as to the prices each company would charge to the drug trade. This is no more than an unwarranted assertion that businessmen always agree on resale prices when making large bulk purchases from competitors. Moreover, this argument misconceives the significance of the bulk purchase to Pfizer. Pfizer had demanded the bulk purchase as a condition of its settlement with Cyanamid so that Pfizer could enter the market promptly and reduce Cyanamid's lead time. It looked upon this bulk material as very important to its ability to compete in the broad spectrum antibiotics business. The gross profit or loss made on this material was insignificant in comparison with the company's overall broad spectrum antibiotics business plans. Accordingly, this payment provides no basis for an inference that Pfizer had any side agreement with Cyanamid concerning resale prices.

5. Changes in Market Shares and Supply and Demand.

Both at trial and in this Court (G. Br. 25-26) the government argues that it is suspicious that prices did not change even though market shares and supply and demand conditions did change. However, the government has never offered any cogent reason why such factors, even if proved, would have influenced the defendants' pricing officials to reduce their list prices and ignore the history and characteristics of the market. For example, why would Pfizer try to increase or even merely protect its market share by reducing its prices in the prescription market when it was virtually certain that competitors would follow at once and the result would only be a reduction in its total dollar sales and in its profits? Why would Pfizer reduce prices even if overall demand slumped when it is a proven fact that during the indictment period demand was inelastic with respect to price? The government cannot give satisfactory answers to these questions. The fact that the government cannot show that in actual markets a non-conspirator would have had reason to change its prices makes its supply and demand and market share evidence of no probative value.

6. Evidence as to Costs and Profits.

In support of its contention that the defendants conspired to fix prices, the government relies heavily on arguments based on the costs and asserted profit margins of the defendants. This evidence is analyzed in Point III, *infra*. Here we simply state that the government has never offered any cogent reason why the profit and market share picture which they assert this evidence depicts, would have influenced the officials of the defendant companies to reduce list prices in the face of the history and characteristics of the market.

SUMMARY OF ARGUMENT

Errors found by the Court of Appeals went to the very heart of the case. Upon a review of the whole record the court concluded that the defendants had been deprived of a fair trial. The decision was based upon an evaluation of the entire charge to the jury in the light of the pattern of the trial. The court considered the overall impact of a number of errors when taken as a whole. These errors consisted principally of instructions which undermined evidence especially relied upon by the defense and may have diverted the jury's attention from the conspiracy issue to the emotional but essentially unprobative charges of profiteering and patent fraud. The effect of the errors was particularly significant because this was a close case on the facts.

I.

The government alleged, and attempted to show at trial, that Pfizer and Cyanamid entered into conspiracy at meetings between the companies' officials held in November 1953, and that Bristol joined the conspiracy at meetings between Pfizer and Bristol executives in December 1955. The men who attended these meetings were the same men who were responsible for the marketing and patent licensing policies in question in this case. Their testimony completely refuted the government's charges of conspiracy and explained the independent business bases for those marketing and patent licensing policies. However, the trial court totally undermined this specific, factual testimony (i) by describing it as denials of conspiracy "in broad terms" and as "assertions of innocence," (ii) by suggesting that the jury base their decision on the circumstantial evidence in the case rather than on the direct testimony, (iii)

by erroneously implying that the testimony was inconsistent with earlier statements by the witnesses and (iv) by telling the jury to disregard some indeterminate portion of the testimony as "legal as well as factual contentions". These instructions overlooked the true nature of this testimony and were devastating to some of the defendants' most important evidence.

II.

Parke, Davis was the second largest company in the broad spectrum antibiotics market, and it followed marketing and patent licensing practices similar to, but even more restrictive than, those of the defendants. Since the government affirmatively asserted that Parke, Davis "absolutely was not" a conspirator, the defendants were entitled to rely on the evidence as to Parke, Davis as showing how an admittedly non-conspiratorial company would act in this market. Although the trial court recognized the defense position on this subject, it refused to give defense requests to charge which would have informed the jury of the admitted non-conspiratorial status of Parke, Davis and would have stated to the jury the defense position concerning this evidence. Moreover, the trial court compounded the error by suggesting that Parke, Davis would have been indicted but was not for some unstated reason and by implying that the jury should ignore the evidence as to Parke, Davis. Moreover, the defendants were improperly restricted in their arguments to the jury on this subject.

III.

The government's charges that the defendants earned "unreasonably high profits" on their broad spectrum antibiotics and that Pfizer committed a fraud on the Patent Office had little, if any, probative value on any proper issue in the

case. But they were especially calculated to divert the jury from the true issues in the case. Despite their potentially prejudicial impact, these false issues were permitted to assume a featured position in the trial and in the court's instructions to the jury.

For almost ten years before trial, the public was bombarded with extensive publicity relating to the allegedly high prices and profits of drug manufacturers. Shortly before and during trial Congressional committees held extensive and far-ranging hearings on this subject, hearings which received widespread publicity adverse to the drug industry. During trial, the government constantly emphasized the issue of high prices and profits, utilizing unrealistic comparisons between bare manufacturing costs and consumer prices. Yet, this evidence was not probative of any issue properly in the case. The trial court's instructions had the effect of increasing the risk that the jury would be diverted from these issues to a finding of guilt based upon a conclusion that the defendants were profiteers.

The charge that Pfizer obtained its tetracycline patent through fraud on the Patent Office was also heavily stressed at trial. Yet, since the alleged fraud took place during *ex parte* proceedings when Pfizer was admittedly acting on its own and had a clear independent interest in securing a patent, it, too, was of no probative value on the proper issues in the case. Despite the lack of relevance of this evidence the trial court refused to strike it, government counsel emphasized it in summation because it "reflected on the people involved," and the court permitted the jury to base a finding of conspiracy on it.

IV.

Two errors related to instructions about the licenses given to Squibb and Upjohn and about the defendants' pre-conspiracy-period conduct. These errors are fully dealt

with in the brief submitted by Bristol, and we do not repeat that discussion here. We simply point out that these errors were prejudicial to Pfizer.

ARGUMENT

The government quotes (G. Br. 36) from the concurring opinion of Mr. Justice Frankfurter in *Johnson* v. *United States*, 318 U. S. 189, 202 (1943), wnere it was said that in reviewing criminal cases it is particularly important for appellate courts "to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure." In this case, the Court of Appeals faithfully complied with that standard.

Having immersed itself in the whole record of the trial, the court came to the judgment that basic rights of the defendants had been prejudiced to such an extent that they had been deprived of a fair trial.

Far from extracting from episodes in isolation abstract questions of evidence and procedure, the court considered the actual effect of the charge as a whole, in the light of the pattern of the entire trial, and explicitly based its decision upon the interrelationship of the various problems raised and the effect of various errors when taken as a whole.

Virtually on its own initiative, the trial court gave instructions to the jury which substantially undermined the portions of the evidence heavily relied upon by the defense. This was in sharp contrast to the extensive emphasis on the evidence principally relied on by the government, which was high in emotional appeal but low in probative value. In addition, the court gave an instruction which virtually directed the jury to find that Bristol joined Pfizer and Cyanamid in conspiracy.

The errors involved in this pervasive pattern are not something dredged up as afterthoughts in order to support an appeal. Defense counsel objected to all of them promptly

and vigorously, and earnestly endeavored to have the trial court correct them before the jury retired. The court, however, was unwilling to change one word of the lengthy charge.*

This pattern of error was the more serious because of the closeness of the factual issues. Whatever view one might take where the government's evidence is "strong" or "overwhelming" (see *Berger* v. *United States*, 295 U. S. 78, 88-89 (1935), this was a case which the majority of the Court of Appeals found to be close and in which the dissenting judge found the government's case "not overwhelming."

I

The Trial Court Erred in Its Instructions as to the Significance of the Testimony of Defendants' Officials.

The testimony of participants in the allegedly conspiratorial transactions formed a key element of the defense case. Each of these men, officials of the defendants and alleged co-conspirators, gave thorough and factual explanations of the independent motivation behind the pricing, marketing and patent licensing policies adopted by the companies in question. Against that background these men also testified in great factual detail about the meetings which the government asserted marked the inception of conspiracy.

The task of the triers of fact was, upon *all* the evidence, to consider whether the conduct of the parties was inconsistent with the testimony as to what was involved in their negotiations and understandings, and (if some degree of inconsistency was found) to weigh the circumstantial evi-

* Each juror had a transcript of the charge in the jury room throughout the deliberations, and they were so impressed by it that they asked permission to keep the copies that had been supplied to them (5051a, 5060a, 5077a).

dence against the direct and decide whether the former so outweighed the latter as to establish guilt beyond a reasonable doubt.

A fair trial required that such an analysis and weighing be done even-handedly and with a clear understanding of the significance and effect of the evidence being considered.

The charge to the jury, however, militated against such an even-handed and intelligent consideration of the evidence. It effectively prevented a proper weighing of the direct evidence by down-grading the testimony of the defendants' officials, by suggesting (without any evidentiary basis) an inconsistency between their testimony and earlier statements and actions, by indicating that the circumstantial evidence as to conduct was more significant than the direct evidence and was indeed decisive, and by permitting the jury to convict even if they believed that the testimony of the principals was true.

A. The Importance of the Officers' Testimony.

The government's case centered around two sets of meetings between principal officers of the defendants:

> (1) The meetings of November 1953 between officials of Pfizer and Cyanamid at which agreements resolving the patent block between the two companies and settling a potential patent interference between them were negotiated; and
>
> (2) The December 1955 meetings between officials of Pfizer and Bristol at which a settlement of the patent infringement suits which had been brought by Pfizer against Bristol, Squibb and Upjohn was reached.

The government built its case around those meetings. The Bill of Particulars alleged that Pfizer and Cyanamid conspired "beginning in about November 1953" and that the arrangements made between Pfizer and Cyanamid in

the meetings of November 1953 "initiated the conspiracy" (B.P. ¶¶ 2, 9, 27, 278a, 281a, 298-300a). The Bill also charged that Bristol joined the alleged conspiracy "beginning in or about December 1955", and referred to the "illegal arrangements" negotiated between McKeen of Pfizer and Schwartz of Bristol in December 1955 (B.P. ¶ 2, 6, 9, 27, 278a, 280-81a, 298-300a).

At trial, government counsel explained to the jury the charge as to Pfizer and Cyanamid in these words:

> "[A] meeting took place between Mr. McKeen of Pfizer and Mr. Malcolm of Cyanamid which the government contends resulted in an illegal agreement to violate the antitrust laws." (1484a)

And government counsel explained that as to Bristol's alleged entry into conspiracy:

> "[U]ntil the time they made that deal—Schwartz made that deal with McKeen in December 1955, there is nothing about the activities of Bristol that we criticize or say are illegal. . . ." (4867a)

Throughout the trial the government consistently emphasized the charge that these meetings were the occasions for the formation of the alleged conspiracy by those in attendance (1106-07a, 1130-31a, 1482a, 1484a, 1495-96a, 4520-21a, 4829-31a, 4853-54a, 4866-67a, 4872-73a, 4999-5000a). As the Court of Appeals noted, this made the testimony about the meetings "vital to any jury decision as to the existence of a conspiracy" (12598a, 426 F.2d at 40). The case was tried and argued to the jury as if what happened at these meetings was of crucial importance.

The government called as witnesses all the company officials who attended any of the meetings, namely, McKeen and Powers of Pfizer, Malcolm and Martin of Cyanamid and Schwartz of Bristol. Each of these men testified fully

and in detail about the meetings which he attended; their testimony on this subject appears on 242 pages of the record.* The questions put to them by both government and defense counsel explored in depth the business situations which gave rise to the meetings, the objectives of the respective parties, the matters discussed, the things said, the points agreed upon and the extent, if any, to which the terms of the alleged conspiracy were among the subjects discussed or agreed upon.

This testimony was flatly inconsistent with the notion that any express or implied conspiracy was formed or existed at these meetings.

Since the government argued at such great length that a conspiracy was formed at these meetings, much of the testimony elicited from defendants' officers by both sides bore on what was or was not agreed on or understood at the meetings. But the testimony was not limited to the meetings. The officers also explained the economic bases of their respective marketing strategies during the indictment period, and negated any understandings, tacit or otherwise, on these subjects at any time. The testimony was thus flatly inconsistent with the theory, first suggested by the government after trial, that perhaps the conspiracy was formed at some time after the meetings.

As the government frankly admitted to the Court of Appeals:

> "The impeachment of the testimony of [defendants'] principal officials was important to the government in this case, since the government had no direct evidence of conspiracy. . . ." (Government Brief in Court of Appeals, 110-111)

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* 2283-304a, 2308-10a, 2328-29a, 2364-66a, 2374-75a, 2378-80a, 2392-97a, 2428-29a, 2431-33a, 2449-61a, 2469-70a, 2472-78a, 2513-33a, 2562-64a, 2567-72a, 2633a, 2674-75a, 2677-78a, 2679-83a, 2703-06a, 2723-25a, 273031a, 2734-35a, 2758-59a, 2766-75a, 2779-80a, 2802-04a, 2806-07a, 2820-21a, 2888-90a, 2917-21a, 2924-25a, 2993-95a, 3038-40a, 3041-42a, 3081-82a, 3092-94a, 3134-50a.

Yet this testimony continued to stand in basic contradiction to the government's case—at least until the trial court instructed the jury.

B. The instructions to the jury undermined the defendants' reliance on this testimony.

The officers' testimony showed that they had met with the legitimate objective of settling certain patent conflicts and controversies, that the agreements they reached were embodied in written contracts concededly lawful in themselves, and that neither the alleged terms nor the subject matter of conspiracy were discussed or agreed upon tacitly or expressly. Because of the strength and coherence of this testimony, defense counsel could and did rest without putting in a case and relied heavily on it in their summations. The court's charge, however, downgraded this evidence and focused the jury's attention instead on the circumstantial evidence as the proper basis for their decision. As the Court of Appeals found, the charge of the trial court "slighted and rather deprecated the testimony about the meetings" (12598a, 426 F.2d at 40).

After charging the jury that conspiracy allegedly began at these meetings, and that the meetings could have provided the opportunity for conspiracy, the court instructed the jury as to the testimony of the officials as follows (5000-01a):

> "Along with all the other evidence in the case, you have heard the sworn testimony of the principal officers of the three defendant companies, and you have heard each of them deny in broad terms that there was any understanding or agreement among them, either express or implied, that there would be uniform and identical prices, or that there would be any exclusion of competitors, or that they would seek together in any way to achieve monopoly power. You must, obviously, give due and deliberate thought to this testimony, and ultimately attribute to it such

> weight as it merits in your impartial judgment. In performing this task, you will have in mind the definition of a combination or conspiracy as it has been given to you in these instructions, recalling, among other things, that the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment, and that the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter. You will take into consideration, also, that if all the elements are shown to establish a conspiracy, it would make no difference that the conspirators did not believe they were violating the law or intend to commit such a violation.
>
> "This is by no means to suggest to you that you overlook or reject the sworn testimony of defendants' officers. That's for your judgment, not mine. The point being made here, as you understand, is that assertions of innocence by such officers may reflect partly legal as well as factual contentions and must be weighed along with all the evidence of every kind that has been submitted to you."

In at least four specific respects this portion of the charge was confusing and erroneous, and its overall effect was to forestall a proper weighing of all the evidence.*

1. The charge began with a serious misdescription of the nature and significance of the testimony. It was described merely as denials of understanding or agreement "in broad terms." Further along, it was characterized as "assertions of innocence." Nowhere was there any recognition of the fact that the testimony consisted largely of affirmative and detailed accounts of what the meetings were about, what was discussed and what was agreed upon. The most effective justification of the allegedly conspiratorial meetings

* When the charge was given the defendants made prompt objection to it, but the court decided to leave it as it was (5041-42a).

was this complete and affirmative account of what was actually involved. This major aspect of the case was passed over when the testimony was described as denials "in broad terms" or "assertions of innocence."

When this scant and inaccurate treatment of a major part of the defense case is compared with the painstaking detail in which the court had previously gone into the various "means and methods" relied upon by the government, the likelihood of an adverse impression upon the minds of the jurors is apparent.

Moreover, even to the extent that the testimony included denials, it could not properly be characterized as being "in broad terms" and as "assertions of innocence." Rather there were direct, factual responses to detailed questions. The testimony was clear that when the witnesses said there was no agreement they meant there was no understanding of any kind, tacit or express (*See, e.g.*, 2364-66a, 2562-66a, 2730-31a, 3042a).

If it is suggested that the jury could be counted on to remember that this testimony was more substantial and affirmative than the trial court indicated, it should be noted that the last testimony about the meetings was completed 37 days before the charge was given to the jury. Although the trial court took great pains to discuss the content and significance of the evidence on Patent Office matters and costs and profits (the subject of evidence and discussion during much of the intervening 36 days), the court gave the jury no help in reconstructing the scope and content of the officers' testimony. Instead, the jury was given a serious understatement of its nature and effect.

2. Having thus given the jury an inaccurate statement of the nature and scope of the testimony in question, the court then proceeded to tell the jury, in so many words, that the circumstantial evidence as to conduct was to be given

greater weight than the direct evidence, and indeed decisive weight. The language of the charge in this respect was (5000a):

> "In performing this task [of giving due and deliberate thought to the testimony], you will have in mind the definition of a combination or conspiracy as it has been given to you in these instructions, recalling, among other things, that *the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment* . . ." (emphasis supplied)

The function of the jury should have been to consider the testimony, to consider the circumstantial evidence and (if any inconsistencey was found) to decide which was the more persuasive, having in mind the requirement of proof beyond a reasonable doubt. Yet, the court effectively precluded such an analysis by telling the jury that "the final answer to this central question in this case must be based upon the actual conduct of the defendants during the period covered by the indictment." This was a clear invasion of the province of the jury.

It may be that, as the government suggests (G. Br. 52, n. 26), the court was paraphrasing language from *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960), where it was said that the existence of combination or conspiracy in that case was "to be judged by what the parties actually did rather than by the words they used." A transfer of that language to the instructions in the present case, however, would be quite inappropriate.

In *Parke, Davis* the question was whether the defendant's attempts to accomplish resale price maintenance had exceeded the permissible limits of the *Colgate* case.* The defendant had announced its intention to refrain from selling to price cutters. This alone the Court said would not

* *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919).

have violated the Sherman Act (362 U. S. at 45-46). But the company went further and took active steps which gained the participation of both wholesalers and retailers in the program of price maintenance (362 U.S. at 46). In this context the Court said:

> "So long as *Colgate* is not overruled, this result [actual resale price maintenance] is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of the manufacturer's right 'freely to exercise his own independent discretion as to parties with whom he will deal.' When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, this countervailing consideration is not present and therefore he has put together a combination in violation of the Sherman Act. Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used." (362 U.S. at 44)

The Court was not dealing with any issue as to what Parke, Davis had said or intended in its announcement of policy. It was rather dealing with the effect of the further acts undertaken by the Company in implementing its policy. The gist of the decision was that the further acts took the company outside the "limited dispensation" of *Colgate*. In this context the governing facts were not what Parke, Davis had said but rather what acts it had performed over and above its announcement of policy. The Court was clearly not declaring that a question as to what understandings were reached between certain parties had to be decided

solely on the basis of their subsequent behavior without regard to the direct evidence of what actually transpired between them.*

In the present case the defendants were entitled to have the jurors pay attention to *all* the evidence, both direct and circumstantial, as to whether the defendants had or had not arrived at an understanding, tacit or express, on the matters alleged in the indictment. The court's charge permitted and, indeed, directed the jury to focus their attention on only a part of the evidence. No juror giving due heed to this part of the charge could have been in any doubt that his "final answer . . . *must* be based upon the actual conduct of the defendants"—irrespective of his evaluation of the direct evidence. This constituted prejudicial error. *See United States* v. *Bloom*, 237 F.2d 158 (2d Cir. 1956).

3. The court next suggested to the jury, without any support in the record, that the testimony given by the officials was inconsistent with earlier statements made by them. This suggestion occurred in these words (5000-01a):

> "In performing this task [of giving due and deliberate thought to the testimony], you will have in mind the definition of a combination or conspiracy as it has been given to you in these instructions, recalling, among other things, . . . that the things the defendants did and said at the time may in such a case be weightier than the things they say thereafter."

* The quotation from *Parke, Davis* in *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 195 (1963) is consistent with what has been said in the text. In *Singer* the Court concluded that the evidence showed a conspiracy among Singer and two foreign competitors to restrain and exclude the competition of Japanese manufacturers of sewing machines. In arriving at this conclusion the Court gave meticulous and extended consideration to the evidence as to the negotiations and communications among the alleged conspirators and also to the things they did. Its conclusion was based upon *all* the evidence.

The testimony of the defendants' officials dealt in great detail with "the things the defendants did and said at the time." There was not a scrap of evidence, written or oral, to suggest that anybody representing any defendant had made any statements inconsistent with what was asserted to have been said and done at the meetings. The inconsistency suggested by the charge simply did not exist.

If the court was merely saying that actions speak louder than words, this was an invasion of the jury's function. The old adage is not a rule of law. As Judge Wyzanski instructed the jury in *United States* v. *Interstate Eng'r Corp.*, 288 F. Supp. 402, 415 (D.N.H. 1967):

> "There is no rule of law that you must prefer direct evidence to circumstantial evidence, or circumstantial evidence to direct evidence. A jury can choose. Some jurors may believe that the direct testimony is better than the circumstantial. Some may think that the circumstantial evidence is better. Some may form their opinion by a combination. It is entirely a jury question."

If the jury thought that the conduct was to a greater or lesser extent inconsistent with the testimony, it was for them to decide whether, in this case, the actions spoke louder than the words. The court's suggestion, which was expressly stated as flowing from its authoritative definition of conspiracy, effectively precluded the jury from making its own evaluation of both the direct and the circumstantial evidence.

4. A further serious error in this part of the charge was that it permitted, and indeed invited, the jury to put the testimony to one side as reflecting partly legal contentions. It had been made abundantly clear to the jury that they were to take the law only from the court (4941a). It would follow that any legal contentions asserted by the witnesses were required to be overlooked or rejected.

The language of this part of the charge was (5001a):

> "You will take into consideration, also, that if all the elements are shown to establish a conspiracy, it would make no difference that the conspirators did not believe they were violating the law or intend to commit such a violation.
>
> "This is by no means to suggest to you that you overlook or reject the sworn testimony of defendants' officers. That's for your judgment, not mine. The point being made here, as you understand, is that assertions of innocence by such officers may reflect partly legal as well as factual contentions and must be weighed along with all the evidence of every kind that has been submitted to you."

The first paragraph of this portion of the charge suggested that the officers' testimony had been basically to the effect that they had not believed that they were violating the law. However, no witness had testified that he did not "believe" he was violating the law, or had made any protestation that he had not intended to do so. The testimony had to do solely with matters of fact as to what was discussed, or not discussed, and what was agreed upon, or not agreed upon. The first paragraph quoted above was therefore irrelevant and misleading.

The second paragraph was also misleading because it suggested, inaccurately, that the officers' testimony consisted of "legal contentions". The testimony was factual about what was or was not said or agreed upon, expressly or by implication.

The factual nature of testimony as to whether there was an agreement was established by this Court in *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 225 (1939). In that case, arising under Section 1 of the Sherman Act, it was held that an inference unfavorable to defendant corporations might be drawn because they

> "failed to tender the testimony, at their command, of any officer or agent of a distributor [defendant] who knew, or was in a position to know, whether in fact an agreement had been reached among them for concerted action."*

This part of the Court's decision rested upon the necessary and explicit premise that the question of agreement or no agreement was one of fact, on which significant testimony could be given. It would be a gross injustice to hold that when corporate officials do appear and do testify "whether in fact an agreement had been reached among them for concerted action" their testimony may be brushed aside on the ground that it involves legal assertions.

Consistently with this Court's reasoning in *Interstate Circuit*, the courts generally in antitrust cases have treated testimony as to whether or not agreement or understanding has been reached as factual testimony. *See, e.g., United States* v. *Standard Oil Co.*, 316 F.2d 884, 890 (7th Cir. 1963); *Delaware Valley Marine Supply Co.* v. *American Tobacco Co.*, 297 F.2d 199, 203, 206 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962); *Continental Baking Co.* v. *United States*, 281 F.2d 137, 143 (6th Cir. 1960); *Cole* v. *Hughes Tool Co.*, 215 F.2d 924, 940 (10th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955); *Milgram* v. *Loew's Inc.*, 192 F.2d 579, 582 (3d Cir. 1951), *cert. denied*, 343 U.S. 929 (1952); *United States* v. *Johns-Manville Corp.*, 245 F. Supp. 74, 79 (E.D. Pa. 1965); *United States* v. *Ward Baking Co.*, 243 F. Supp. 713, 717 (E.D. Pa. 1965); *Dyson Theatres, Inc.* v. *Buffalo Theatres, Inc.*, 86 F. Supp. 716, 727 (W.D.N.Y. 1949), *aff'd mem.*, 190 F.2d 951 (2d Cir. 1951)

Testimony very similar to that involved in the present case was treated as both factual and weighty in *United States* v. *Eli Lilly & Co.*, 1959 Trade Cas. ¶ 69,536 (D.N.J.

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* *See* to the same effect *William Goldman Theatres, Inc.* v. *Loew's, Inc.*, 150 F.2d 738, 743 (3d Cir. 1945), *cert. denied*, 334 U.S. 811 (1948).

1959). In the face of extensive circumstantial evidence relied upon by the government to show an antitrust conspiracy, the court entered judgment of acquittal at the close of the government's case saying (at 76,150):

> "Thus the Government's case has consisted in large measure of the testimony of high-ranking corporate officers and employees of the defendants. . . .
>
> "This approach, an endeavor to prove the guilt of the defendants out of the mouths of their own officers and employees, resulted in testimony tending to establish the innocence of the defendants, if believed, because each of the foregoing witnesses either testified that his determinations, practices and policies as to polio vaccine were based upon independent business considerations only, and were in no wise the result of an understanding or agreement, tacit or otherwise, with any other defendant, or at least gave no testimony tending to establish the contrary."

The four decisions of this Court cited by the government to support the claim that whether an "agreement illegal under the Sherman Act has been made is a mixed question of fact and law" (G. Br. 51) have no bearing here. In *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 396 (1948) the Court's reference to "mixed questions of law and fact" was merely part of a statement that the lower court had been wrong both on the law—as to whether certain things may be lawfully agreed to—and on the facts —as to whether there had been an agreement. This is a far cry from stating a rule for criminal conspiracy cases that the question whether defendants formed an agreement (which would admittedly be illegal if formed) is anything other than a pure question of fact. *United States* v. *General Motors*, 384 U.S. 127, 141, n. 16 (1966), involved only a question whether the evidence was so overwhelming as to compel a finding of conspiracy as a matter of law. In this sense it was like any factual question in that the

evidence may establish it as a matter of law. In *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44-45 (1960), a finding of fact that there was no conspiracy was set aside because the wrong standard of what was lawful conduct was applied. The same is true of *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194, n. 9 (1963). All of these cases dealt only with questions of this Court's power to reverse erroneous findings of fact by lower courts. They give no support to the proposition that the question whether an officer agreed to something is any more a mixed question of fact and law than any other kind of fact about which testimony is commonly given in criminal conspiracy cases.

But even if it were to be assumed that the testimony had some "legal" content, that would not substantially obviate the error here, since the charge gave the jury no guidance as to what portions of the testimony were to be regarded as subject to the "legal contention" infirmity.

The language of the court was that the legal contentions might be found in "assertions of innocence by such officers". There were no assertions of innocence as such. While all of the testimony was inconsistent with the allegation of understanding, tacit or express, and it all pointed in the direction of innocence, in no sense could any part of it properly be characterized as assertions of innocence. When witnesses testified in detail about what happened and did not happen at the meetings, they were showing their innocence. When they testified as to the business reasons which led them to follow the courses of conduct relied upon by the government, they were demonstrating innocence by showing independent reasons for their behavior. But this evidence of straight-forward business conduct was not mere "assertions of innocence."

What part of all of this was regarded by the trial court as reflecting legal contentions? There is nothing in the charge to answer this question. The jurors were left hopelessly at sea in trying to decide what part the court referred

to as areas of law which were its exclusive province and what part was supposed to be factual. A charge delegating to the jury the task of making such judgments, without any clear guidelines, is erroneous. See *Bollenbach* v. *United States*, 326 U.S. 607, 613-14 (1946); *United States* v. *Christmann*, 298 F.2d 651, 654 (2d Cir. 1962); *Chargois* v. *United States*, 267 F.2d 410 (9th Cir. 1959); *cf. United States* v. *Persico*, 349 F.2d 6 (2d Cir. 1965).

The overall effect of the instructions on the testimony of the officials was to prevent adequate and proper consideration of an important part of the evidence going directly to the basic issues in the case. It is still the law that a Sherman Act conspiracy arises only when there is an agreement, tacit or express, among the alleged conspirators. Such agreement may be found from the communications among the conspirators or from the behavior of the parties. But such behavior is simply one type of evidence from which the forbidden agreement may be inferred. As this Court put it in *Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954):

> "The crucial question is whether respondents' conduct . . . stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement."

These errors were not cured by the other instructions referred to by the government (G. Br. 51). The instruction on credibility said nothing to help the jury distinguish "legal contentions" from "factual contentions". The other instructions merely defined some of the issues in the case and said nothing whatever about the significance of the officers' testimony. There is nothing anywhere in the entire charge which could undo the harm created by the instructions concerning this testimony.

The government attempts to brush off the criticisms of the instructions as to the officers' testimony on the ground that they "were based on the erroneous view that the government was required to show a specific express agreement" (G. Br. 52). The fact that on rehearing the Court of Appeals recognized that the conspiracy was alleged to have been implied rather than express did not by any means invalidate that court's criticisms of the instructions. Certainly the Court of Appeals did not intend to withdraw those criticisms, as is shown by the fact that in the majority opinion upon rehearing the instructions as to the officers' testimony were listed among the items as to which the court said,

> "[I]t would indeed be difficult for an appellate court to say that these items may not have affected the jurors' votes in a criminal case so close as this." (12618a, 437 F.2d at 959)

Apart from questions of what theories the Bill of Particulars permitted the government to assert as to when and how the conspiracy was formed, the case was certainly tried in such a way as to make the meetings and what happened at them a central issue in the case. Whatever conspiracy was alleged, it was consistently claimed to have originated as between Pfizer and Cyanamid at the meetings in November 1953 and to have been adhered to by Bristol, Squibb and Upjohn at the meetings in December 1955 when, as government counsel claimed, "Schwartz made that deal with McKeen" (4867a). Defendants were entitled to have their officers' testimony about these meetings given the full consideration by the jury which the actual charge prevented.

The case was tried, and was argued to the jury, on the theory that this testimony was an important part of the evidence which would have to be weighed along with the circumstantial evidence. The court's charge changed all that in a few paragraphs. The testimony was given much less significance than had been attributed to it by both the

prosecution and the defense. A question of credibility was raised by reference to non-existent inconsistencies. The jury was told that in the end they *must* base their decision upon the conduct of the parties. And some undefined part of the testimony was completely neutralized by branding it as argument on points of law which were the sole province of the court. The cumulative effect of the court's treatment of this testimony was devastating to the defense.

II

The Trial Court Erred in Its Treatment of the Evidence Relating to Parke, Davis.

Parke, Davis was the second largest manufacturer of broad spectrum antibiotics and made almost one-quarter of total broad spectrum sales during the indictment period (GX 877, 10246a). Its practices in regard to price levels, price changes, dosage forms, and marketing techniques were virtually identical to those of the defendants. Its practices in regard to sales in bulk and licensing under its patents were more restrictive than those of the defendants, since Parke, Davis issued no licenses and made no bulk sales (3332-33a, 3355-58a; Ct. X 4, 6692-96a, 6720-52a, 6836-46a).

Despite these basic similarities between the conduct of Parke, Davis and that of the defendants, the government asserted "on the record" that Parke, Davis "absolutely was not" a conspirator (4527a). This was more than a concession that no charge had been made against Parke, Davis; it was an affirmative assertion that that company was not a conspirator. This assertion made the evidence as to Parke, Davis very important to the defense because it showed that a company acting independently adopted the very practices which the government claimed would not have been adopted by the defendants in the absence of conspiracy.

The trial court, without any request from the government, raised questions as to whether the defendants could fully rely on this evidence, practically removed it from the jury's consideration and severely restricted arguments that defense counsel could make concerning it. Both before and after the charge to the jury defense counsel made consistent but unavailing objection to the trial court's treatment of this evidence (4646-47a, 5028a).

Although some of the instruction relating to Parke, Davis is reproduced in the government's brief (67-69), it is to the final paragraph, only partially reproduced in that brief, that the opinion of the Court of Appeals referred. We quote the paragraph in full, italicizing the words omitted in the government's brief:

> "Now, insofar as Parke, Davis and its activities were material factors in the market which concerns us in this case, the facts about that subject have been placed before you and are part of the total evidence you may consider in reaching your judgment. However, the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direction as a fact in itself. There is no profit here in speculating as to why Parke, Davis *was not indicted. Parke, Davis* is not on trial here, and the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them as they have been presented to you in this courtroom." (5001-02a)

This instruction was prejudicial because it failed to submit a vital element of the defense case to the jury and because it may well have caused the jury to disregard the defendants' arguments based on this evidence.

A. The Charge Obscured the Significance of the Evidence and May Well Have Prevented the Jury from Giving Proper Consideration to It.

The key to the significance of the Parke, Davis evidence was the given fact that Parke, Davis was not a conspirator. That fact imposed upon the government the formidable task of explaining how it was that the defendants' acts proved conspiracy when essentially the same acts of a non-conspirator did not. But the court never allowed the jury to know of this key to the significance of the evidence.

The significance of the evidence was made known to the court before the instructions were given to the jury. The subject was discussed during a conference of counsel with the court (not in the presence of the jury) in which the following colloquy occurred:

> "The Court [addressing government counsel]: . . . Let me ask you: What do you think about the situation of Parke, Davis in this case? There has been a memorandum that you haven't responded to about the significance of Parke, Davis' conduct, same prices, same general business behavior, there is no charge that it is a conspirator and I think I can fairly read the statement of the Government, as being a concession that Parke, Davis was not a conspirator.
>
> "Mr. Sklarsky: It absolutely was not, your Honor. We state that on the record.
>
> "The Court: You not only concede that, you assert it?
>
> Mr. Sklarsky: Yes, your Honor." (4526-27a)

In the same conference the trial court stressed the difference between such an affirmative assertion of innocence and a mere failure to indict. When government counsel suggested that the jury simply be told that the fact that Parke, Davis was not indicted or named as a co-conspirator was of no consequence (4527a), the court responded:

"The Court: No, but I can't let it go at that, when you have announced on the record that Parke, Davis was not a conspirator.

"Mr. Sklarsky: Of course, your Honor.

"The Court: You haven't just said, 'We didn't indict Parke, Davis,' That might be different. But you have stated that Parke, Davis was not a member of this conspiracy.

"Mr. Sklarsky: That is right.

"The Court: And then the evidence shows that it does many things similar to those proved against these defendants." (4528a)

There was in this case, therefore, an independent and non-conspiratorial model with which to compare the behavior of those accused of conspiracy. The defendants intended to rely heavily upon the argument which had been foreshadowed by the trial court itself in the colloquy as follows:

"Why shouldn't [the defendants] argue that this one large company, comprising a fourth or more of the market, you allege, behaving in very similar ways, has been declared by the Government to be a non-conspirator which helps to show that other people, behaving the same way, ought also to be viewed as not being conspirators?" (4528a)

The defendants asked the court to include in the charge a reference to the government's assertion of Parke, Davis' innocence. After the colloquy quoted from above, Bristol submitted a revision of the defendants' Joint Request

No. 43 which would have informed the jury that "[T]he prosecution has told us [that Parke, Davis] was not a member of the conspiracy charged, . . ."* This request was denied (4712a) and the information was not given to the jury, either in the form requested by the defendants or in any other form.

The charge as given merely referred to the fact that Parke, Davis had not been indicted and was not "alleged to be a conspirator". It thus withheld from the jury the information which the trial court itself had recognized was the key to the significance of the evidence.

By refusing to put this information before the jury, and by refusing as well to give the substance of the requested instructions which explained the defendants' theories as

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* Bristol Revised Request No. 43 was as follows:

"It is undisputed and I caution you to remember that Parke, Davis is a large manufacturer and seller of broad spectrum antibiotics. Parke, Davis had a patent on Chloromycetin during the period of the indictment and Chloromycetin made up a substantial portion of broad spectrum antibiotic sales.

"There is evidence that Parke, Davis, *which the prosecution has told us was not a member of the conspiracy charged,* used dosage forms similar to those used by defendants and had a pricing policy in which it attempted to meet the prices of the other sellers of broad spectrum antibiotics.

"You are entitled to consider the extent to which the evidence may show that Parke, Davis engaged in conduct which the government claims proves conspiracy, and the further fact that no one claims that this conduct by Parke, Davis was pursuant to the conspiracy claimed by the government.

"I caution you to remember these facts because it is very easy for a jury to concentrate only on the companies which are before it." (5604-05a) (emphasis added). See also Joint Request No. 43 (5186-8a); Cyanamid Revised Request No. 43A (5555a).

to the significance of the Parke, Davis evidence (5555a), the court declined to put an important defense theory of the case to the jury. This in itself was substantial harmful error.*

But the error did not stop there. After refusing to instruct the jury of the government's assertion on the record that Parke, Davis "absolutely was not" a conspirator, the court instructed the jury in such a way as to suggest that there might be some reason other than innocence for the failure to indict Parke, Davis. The court's language was (5002a):

> "However, the fact that Parke, Davis has not been indicted and is not a defendant has no relevance whatsoever in any direction as a fact in itself. There is no profit here in speculating as to why Parke, Davis was not indicted."

This part of the instruction seemed to suggest a mystery, with which the jurors were not to concern themselves, as to the reason for Parke, Davis' status as a non-defendant. The Court of Appeals correctly said:

> "The charge as given could well have had the effect of stressing the failure to indict, thus carrying the connotation that Parke, Davis might have been guilty but was not indicted for undisclosed reasons." (12604a, 426 F.2d at 44)

The trial court concluded its discussion of this subject with an instruction to the effect that the verdict would have to be based upon the evidence as to the defendants' conduct alone. The language was (5002a):

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* *Sorrells* v. *United States*, 287 U.S. 435, 452 (1932); *Salley* v. *United States*, 353 F.2d 897 (D.C. Cir. 1965); *Perez* v. *United States*, 297 F.2d 12, 15-16 (5th Cir. 1961); *United States* v. *O'Connor*, 237 F.2d 466, 474, n. 8 (2d Cir. 1956); *United States* v. *Indian Trailer Corp.*, 226 F.2d 595, 598 (7th Cir. 1955); *Marson* v. *United States*, 203 F.2d 904, 912 (6th Cir. 1953); *Lutfy* v. *United States*, 198 F.2d 760, 762 (9th Cir. 1952).

> "Parke, Davis is not on trial here, and the verdict concerning the defendants which are on trial must be based in the end on the law and the evidence relating to them as they have been presented to you in the courtroom."

The clear import of this instruction was that, since Parke, Davis was not on trial and the defendants were on trial, the verdict must be based upon the evidence as to what the defendants did and not upon the evidence as to what Parke, Davis did. This completed the demolition of the argument which the trial court had previously recognized as an important one available to the defendants. The Court of Appeals concluded that it seemed "impossible to deny that the treatment which the charge gave to the highly important Parke-Davis defense alone might well have prejudiced the jury's judgment" (12618a, 437 F.2d at 958-59).

B. The Erroneous Treatment of the Parke, Davis Evidence Was Seriously Prejudicial.

In the government's brief it is contended that in their summations to the jury the defendants did not make as much of the Parke, Davis situation as they might have (G. Br. 64). It is true that defense counsel felt handicapped in attempting to make use of this material, but this fact emphasizes rather than mitigates the harmful nature of the errors committed.

The court had refused to instruct the jury as to the government's assertion that Parke, Davis was not a conspirator (4712a), and indicated an intention to give the substance of the government's request on the Parke, Davis evidence (4646a), which stressed the irrevelance of the fact that Parke, Davis was not a defendant. The court had further given ominous, but not very clear, indications that the defendants would be limited in what they could say on this subject. There was reference to a "risk to which the

defendants ought to be peculiarly sensitive" (4646a). There was reference to the possibility that the court would stop defense counsel in their arguments if they went too far (4646a). In the same context the court said that it would "tell the jury that in the end the fact that some other party has not been indicted is not relevant to their determination of the guilt or innocence of these defendants who are on trial before them" (4647a). In these circumstances, defense counsel were, of course, quite circumspect in their use of this material in argument.

A further point made in the government's brief is that the jurors expressed interest in the Parke, Davis evidence and asked for and were given materials on this subject during their deliberations (G. Br. 72). However, this interest only tends to underscore the highly prejudicial effect of the instructions. Each juror had before him in the jury room a copy of the court's charge (5051a, 5060-61a). They were obviously looking at the charge because their request for materials on Parke, Davis was made by reference to a specific page of the charge (5071a). They may well have found that they could not do anything with a comparison between the conduct of Parke, Davis and that of the defendants because

1. they did not know whether Parke, Davis was in fact a conspirator;

2. they had been told that they should not speculate as to why Parke, Davis had not been indicted, which suggested the possibility that there was some reason other than innocence;

3. they had been told in the most emphatic terms that the non-indictment had "no relevance whatsoever in any direction"; and

4. they had been told that their verdict had to be based on the acts of the defendants which were on trial, and not on the acts of Parke, Davis which was not on trial.

Despite their obvious interest in the Parke, Davis story, the jurors were not in a position to give it the significance which it deserved.

In a circumstantial evidence case, in which an inference of conspiracy is asserted on the ground that certain specific business practices would not have been undertaken by the defendants in the absence of conspiracy, the fact that a company not engaged in conspiracy performed those same acts is a highly relevant and significant fact. The Court of Appeals did not exaggerate when it found that this evidence was "all-important to the defendants". It was clearly right when, on rehearing, it said:

> "[I]t seems impossible to deny that the treatment which the charge gave to the highly important Parke-Davis defense alone might well have prejudiced the jury's judgment" (12618a, 437 F.2d at 958-59).

III

The Trial Court's Treatment of the Issues of Costs and Profits and Alleged Fraud on the Patent Office was Prejudicial.

Two aspects of the case were particularly likely to divert the jury from the true issues. These were the government's contention's that the defendants' prices and profits were "unreasonably high" and that Pfizer obtained the tetracycline patent through fraud on the Patent Office. Neither of these matters bore directly, if at all, on the critical issue of conspiracy, but each was high in emotional impact. There was great danger that the jury would be led to convict because of a belief that the defendants were profiteers or that Pfizer had engaged in misconduct in the Patent Office.

The Court of Appeals reviewed the evidence on these subjects with great care and examined the pattern of the trial both as to the government's use of the evidence and as to the court's treatment of it in charging the jury. The conclusion was that, in view of the nature of the evidence and the way it was treated throughout the trial, there was danger that the jurors were diverted from the true issue of conspiracy. This problem was pointed out in several passages of the majority opinion,* and was summarized as follows:

> "The jury thus entered upon its deliberations with its attention diverted from the real issues to patent fraud and unreasonably high prices—both inflammatory issues. Quite apart from their relevance, these so-called means and methods could well have so prejudiced the jury that it either failed to resolve the primary issue or subordinated it to the issues stressed. Because of this real possibility, defendants Pfizer, Bristol and Cyanamid are entitled to a new trial." (12602a, 426 F.2d at 43)

A. Constant Emphasis on Charges of "Unreasonably High" Prices and Profits Created a Damaging but False Issue in the Case.

In the Court of Appeals the defendants contended that the evidence concerning their costs was inadmissible. That court did not discuss or decide the question of admissibility. Its decision was rather that, quite apart from their relevance, these matters could well have been prejudicial (12602a, 426 F.2d at 43; 12618a, 437 F.2d at 959). Upon the petition for rehearing, the court again referred to "the undue emphasis on the excess of the selling prices over factory costs and the pattern which the trial took" (12618a, 437 Fed.2d, at 959).

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* 12593-94a, 426 F.2d at 38; 12595a, 426 F.2d at 39; 12598-99a, 426 F.2d at 41; 12600a, 426 F.2d at 41-42; 12601a, 426 F.2d at 43; 12618a, 437 F.2d at 959.

In the argument which follows we show the nature of the evidence and its lack of probative value, the circumstances which made the evidence inflammatory, the use made of the evidence by the government and, in the light of this, the trial court's prejudical treatment of the subject.

1. The Cost Evidence Had no Real Probative Value on any Issue Properly in the Case.

It is elementary that the question whether prices are reasonable is not an issue in a price fixing case under the Sherman Act. *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150 (1940).

In *Trenton Potteries* the Court stated one ground of its decision as follows:

> "Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable —a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies" (273 U. S. at 398).

Indeed, there are decisions indicating that, even if there were an express legislative command, it would be unconstitutional to make the legality of business conduct depend upon so vague and subjective a standard as whether prices are unreasonably high.*

The only way in which the levels of prices and profits could have been made relevant in this case would have been to produce evidence tending to show that the prices and

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* *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81 (1921); *Weeds, Inc.* v. *United States*, 255 U. S. 109, 111 (1921); A. B. *Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233 (1925); *Cline* v. *Frink Dairy Co.*, 274 U. S. 445, 457 (1927). *Cf. United States* v. *National Dairy Prods. Corp.*, 372 U. S. 29 (1963).

profits were inconsistent with what would have been expected of a business being operated independently and without conspiracy. No such showing was made, and the evidence tended the other way.

Since the businesses of the defendants are operated for the purpose of making profits, the management of each company would necessarily seek to avoid business decisions and actions which would probably reduce profits. And all the evidence indicates that a price reduction by any of the defendants in the prescription market would in all probability have had just this effect. The failure to reduce prices, therefore, provides no support whatever for an inference of guilt.

The cost evidence principally relied on by the government in this case was particularly uninformative because it related to partial costs. The evidence as to Pfizer, for example, consisted of two groups of partial costs. The first consisted of bare production cost (GX's 841, 9176a; 1978-80a, 1999a). Among the costs omitted were those for general administration, distribution, selling and advertising, research and income taxes. In view of the obvious importance of research in this industry and the extensive organizations maintained for distribution and sales promotion, there can be no ques- that these omitted costs were very large in amount (1978-80a).

The second group of Pfizer's partial costs consisted of operating statements of the marketing division which sold the products (GX's 842, 870-71, 9269-73a, 10222-25a). They included some additional elements of cost but clearly did not take into account research expenses, general and administrative expenses or taxes (1982-84a). Moreover, they did not show costs on any individual dosage form. The "operating profits" calculated from these partial costs were therefore not the true profits of the company on any item.

As to the other companies, the government's evidence consisted in the main of partial cost studies. For some years

and for some products there were figures showing costs which were omitted from the Pfizer studies, but in the main the evidence consisted of partial cost tabulations which, because they were prepared on different bases, were not comparable with each other.

The government's failure to offer evidence as to total costs and total profits cannot be explained on the ground that such evidence was not available. During the grand jury investigation which led to the present indictment, each defendant supplied to the government cost studies, prepared on principles determined by independent public accountants, which showed total costs for each dosage form of each broad spectrum antibiotic (1986-90a). From these studies, actual profitability of each item could be ascertained. The government made no use of these studies, however.

It is argued that the defendants had it within their power to come forward with their own evidence of total costs (G. Br. 47). However, this argument is made in disregard of the fact that the government's burden of persuasion in a criminal case never shifts. Even where affirmative defenses such as insanity or entrapment are involved, once sufficient evidence is in the record to raise the question, the government has the burden of persuasion beyond a reasonable doubt on these issues as well as on all elements of the original offense. *Davis* v. *United States,* 160 U. S. 469 (1895); *United States* v. *Groessel,* 440 F.2d 602, 606-07 (5th Cir.), *cert. denied,* 403 U. S. 933 (1971); *Notaro* v. *United States,* 363 F.2d 169, 173-75 (9th Cir. 1966); 1 Wharton's *Criminal Evidence* § 13 (12th ed. 1955); 2 Wright, *Federal Practice and Procedure* § 403 (1969).

In the present case the government proved Pfizer's sales and some of its costs. However, there is uncontradicted evidence that Pfizer had other substantial costs which were not proven by the government but which the government admitted were in fact incurred (1978-79a, 4834a). Since

proof of the existence of profits requires proof that total costs were less than sales and since the government has failed to establish the extent to which Pfizer's total costs were less than this amount, it has not established that Pfizer had net profits which could in any way support the conspiracy charges.* *Stump* v. *Bennett*, 398 F.2d 111 (8th Cir.) (en banc), *cert. denied*, 398 U. S. 1001 (1968); *Government of the Virgin Islands* v. *Smith*, 278 F.2d 169 (3d Cir. 1960).

The principle that partial costs are no substitute for total costs was recognized in a monopolization context in *United States* v. *Aluminum Company of America*, 148 F. 2d 416 (2d Cir. 1945). Judge Learned Hand said:

> "[O]bviously it would be unfair to 'Alcoa' to take, as the measure of its profit on ingot, the difference between selling price and mill cost; and yet we have nothing else." (148 F. 2d at 427)

In attempting to justify its failure to use the total cost evidence, the government has asserted that the executives of each defendant were kept aware of their own company's production costs and that these costs had business significance. Of course, production cost have business significance, but they do not permit a businessman to ascertain the profitability of his enterprise. The government has also asserted that production costs have peculiar significance because they are inescapable costs of doing business. There is no

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* The government refers to the fact that when some of the tabulations showing total costs and profits were offered by defendants during the prosecution's case, their reception was postponed (G. Br. 48). The defendants, whose principal witnesses had already been called by the government, were seeking to round out their case during the presentation of the prosecution's case in order to shorten the trial. When Pfizer offered an exhibit on total costs and profits (which had been in the possession of the government for over seven years) it was excluded at that stage of the trial on the ground that the government needed more time to study it (1847-49a, 1988-90a).

showing, however, that other cost items, such as research, advertising, promotion and selling, were any less real or inevitable.

In addition to the fictitious nature of the profits asserted, another difficulty with the government's reliance upon the theory of excessive prices and profits is that no standard was provided in the evidence for determining whether the prices and profits were too high. The government made two efforts to suggest such a standard, neither of which succeeded.

One effort was by the introduction of a Federal Trade Commission Report on Profit Rates of Manufacturing Corporations, 1947-1962, which showed that company-wide pretax profits for companies classified under the heading "drugs" ranged from 17.1 to 23.3% of sales during the years 1956-1962 (GX 942, 10331a). These company-wide averages (which incidentally showed nothing at all as to gross or operating profits) were not a satisfactory standard because they included all kinds of products, new and old, patented and unpatented, prescription drugs and over-the-counter drugs, and in all probability products that were not drugs at all.* Moreover, no evidence as to the defendants' company-wide net profits was introduced so that there is nothing in the record with which to compare the figures in the FTC report.

The second effort to establish a standard of comparison consisted of evidence from which it was argued that the defendants' profits on broad spectrum antibiotics were "abnormal" (GX's 852, 986a; 854, 9932a). In this connection the government pointed to the difference between the gross margins of Squibb and Upjohn, which it characterized as

* The companies in the study included corporations "primarily engaged in manufacturing, fabricating, or processing medicinal chemicals and pharmaceutical products; and in the grading, grinding, and milling of botanicals" (GX 942, at 10384a). All the sales and profits of each company were included, whether or not they were drug sales and whether or not they were made in the United States.

"normal" for the drug industry, and those of the defendants, which it characterized as well above the industry "norm". A basic defect in this position is that Squibb and Upjohn as bulk purchasers would necessarily have lower gross margins than the manufacturing companies. Moreover, the only "norm" pointed to was testimony that the *average* gross profits for the drug industry were between 55% and 70% of sales and that at least this much gross profit was probably needed to make any net profit at all (2900a, 3175-76a). There is no logic or justice in saying that the gross margins on such outstanding products as tetracycline should be held to anywhere near the industry average, which necessarily includes all kinds of products, including some unprofitable ones. The only significant comparison could be with other patented products and with trademarks having wide acceptance among the medical profession.*

As a matter of fact, the evidence disproves the government's theory in the case of Pfizer. A table showing the percentages of "gross profit" and "operating profit" on all Pfizer prescription drugs introduced during the indictment period established that the broad spectrum antibiotics were not out of line with the other products. Some of the other products yielded higher margins than did Terramycin or tetracycline (4584-88a; PX 641, 12582a).

For these reasons, the comparison (G. Br. 47) between Pfizer's "operating profits" on broad spectrum antibiotics and those on its products as a whole is not valid. The entire group of products included many drugs which no one would seriously contend could be expected to be as profitable as "the wonder drugs". And, as has been shown, there were several Pfizer products which produced more "operating profit" than the broad spectrum antibiotics.

The importance of limiting profit comparisons to situations that are truly comparable was recognized by this

* The fact that penicillin was not patented made it not comparable to broad spectrum antibiotics for this purpose.

Court in *United States* v. *E. I. du Pont de Nemours & Co.*, 351 U. S. 377 (1956), a monopolization case. There the evidence related to net profits after taxes earned by du Pont on cellophane. The Court said:

> "Nor can we say that du Pont's profits, while liberal (according to the Government 15.9% net after taxes on the 1937-1947 average), demonstrate the existence of a monopoly without proof of lack of comparable profits during those years in other prosperous industries. Cellophane was a leader, over 17% in the flexible packaging materials market. There is no showing that du Pont's rate of return was greater or less than that of other producers of flexible packaging material." 351 U. S. at 404*

In the lower courts the government has suggested three rationalizations for the use of the evidence as to costs and profits. None of these would justify the broad use actually made of the evidence at trial, and none of them presents any substantial basis for concluding that the evidence had probative value.

1. *Motive.* The government has claimed that the cost evidence helped to show the importance of broad spectrum antibiotics profits to the defendant companies and therefore was evidence that they had a motive to conspire. However, there was no dispute about the importance of the products to the defendants; they themselves asserted the importance of these products to them. Comparative sales figures are all that is needed to make the point. From these figures it is clear that a 10% reduction in broad

* The government also argues that the cost evidence was admissible to prove that the defendants had monopoly power (G. Br. 42). However, as the quotation from the *du Pont* case in the text makes clear, such evidence is of no value in a monopolization case without a proper standard for comparison. No such comparison was supplied in this case. Moreover, the admission of the evidence on the monopoly power issue could not justify use of it on the conspiracy issue where it had no probative value.

spectrum antibiotics prices, for example, would have meant a tremendous reduction in Pfizer's total dollar sales (GX's 877, 10246a; 879, 10248a). Thus, the cost evidence added nothing to the government's case. Moreover, the importance of products to a company would, in the absence of conspiracy, provide it with strong motives not to make self-defeating price reductions, issue licenses or make bulk sales.

2. *Alleged Declines in Costs.* The government has argued that the cost evidence shows declines in costs over time which, in the absence of conspiracy, would have resulted in reductions in the defendants' list prices (4848a, 4852-53a).

The cost evidence as to Pfizer, though incomplete, made the following points very clear:

a. Pfizer's production costs fluctuated slightly both upwards and downwards during the indictment period; from one accounting period to another there were five instances of decline and five of increase. The first decline which could be said to indicate a trend occurred in 1960, which was Pfizer's first full year of production by direct fermentation (1188-90a; GX 841, 9176a). As it happened, Pfizer reduced its list prices to direct retailers and private hospitals by 15% in 1960 (GX's 841, 9176a; 866, 10161a).

b. The small variations in Pfizer's production costs and even the change which occurred in 1960 could not have had much effect on its total costs or net profits (GX 841, 9176a).

c. There were instances where differences in production costs were not large enough to compensate for variations in other partial costs (GX's 841-42, 9176-273a; PX's 637-40, 12571-81a).

d. Although the "operating profits" on the company's tetracycline products, as percentages of their sales, increased during the period 1957 through 1960,

this increase was even less than the decrease in "operating profits" for Terramycin (PX 641, 12582-83a).*

3. *Variations in Costs Among the Alleged Conspirators.* The government also argued that the evidence showed variations in costs among the alleged conspirators which in the absence of conspiracy would have led to price reductions in the prescription market. Specifically, it was argued that since the defendants' production costs were significantly lower than those of Squibb and Upjohn, in the absence of conspiracy Pfizer or Cyanamid would have made predatory price cuts either to drive those companies out of the market or to prevent their market shares from growing (4848a, 4853a, 6508a).

Apart from the questionable legality of the course suggested by the government, this argument depends on the assumption that Bristol would not have reduced its bulk price in order to make it possible for Squibb and Upjohn to survive. In view of Bristol's dependence on its sales to Squibb and Upjohn, this assumption is unwarranted; as the government admits, "the continued existence of Bristol de-

* The partial cost data as to the other defendants also can not support the government's contention that they would have reduced prices in the absence of conspiracy. After the first year or two the production costs of both Bristol and Cyanamid were about as stable as Pfizer's (GX's 837, 9051a; 844, 9279a; 845, 9338a), and had little effect on the total costs of those companies.

Bristol's "adjusted profits" on its own label sales of tetracycline (Polycycline) were relatively stable and its "adjusted profits" on its phosphate complex products (Tetrex), upon which it principally relied, stabilized at a lower level after they had become established on the market (GX's 192, 8759a; 838, 9139a).

The evidence as to the relative profitability of Cyanamid's products is incomplete as to various years and was not calculated on a consistent basis, so that no meaningful year by year comparison of its "profits" on tetracycline can be made. (*Compare* GX 852, 9862a *with* GX 854, 9932a).

There is no evidence showing variations in total costs on specific products for any defendant over the relevant time period.

pended on its ability to sell bulk tetracycline to Squibb and Upjohn" (G. Br. 19). In fact, Bristol did reduce its bulk price to those companies when they met Pfizer's 1960 price reductions.

Moreover, any suggestion that, in the absence of conspiracy, Pfizer would have made a predatory price cut aimed at Squibb and Upjohn depends on the further assumption that Pfizer would have expected to benefit financially from such a move. This is most unlikely, however, since any price cut deep enough to have driven those companies out of the market would have reduced total revenues so drastically as to reduce Pfizer's profits. When the fact that there is no evidence that Pfizer had any way of knowing what bulk price Bristol was charging Squibb and Upjohn is added to all this, it is clearly illogical to argue that an inference of an unlawful Sherman Act conspiracy should be drawn from Pfizer's failure to engage in intentional predatory pricing.

In support of its theories that costs had probative value in establishing conspiracy, the government relies upon certain cases where, in considering the sufficiency of the evidence of conspiracy, courts referred to the relationship between costs and prices (G. Br. 40-42). However, with the exception of the *Lilly* case referred to below, none of the authorities cited involved markets having the characteristics of the prescription drug market. Moreover, none of the cases dealt with the situation where the defendants had supplied the government with a more complete form of cost evidence such as the accounting tabulations supplied in the present case. Finally, none of the cases involved the question of admissibility of inflammatory evidence of production or other partial costs in a setting where the prosecutor's evidentiary theories logically depended upon total costs.

The reliance on *United States* v. *Eli Lilly & Co.*, 24 F.R.D. 285, 291, 293 (D. N.J. 1959), is also misplaced. In

that case, the court granted a government motion under Rule 17(c) of the Federal Rules of Criminal Procedure for the issuance of a subpoena compelling the production of documents prepared for the purpose of aiding in pricing by defendants—documents which included evidence of costs. This was done on the theory that cost evidence might have some "liminal" relevance. 24 F.R.D. at 291. This opinion on pretrial discovery is of little significance because the court refrained from passing upon and very carefully reserved until trial the question of the admissibility of the evidence. What is significant about the *Lilly* case is that the cost evidence had so little probative value that the government attempted to use it only to impeach one witness, and it was not considered important enough to be mentioned in the exhaustive opinion granting a motion for acquittal at the close of the government's case. 1959 Trade Cas. ¶ 69,536 (D. N.J. 1959).

2. The Evidence as to Costs and Profits Was Used in a Setting in Which It Was Likely to be Highly Prejudicial.

Both before and during the trial the public was subjected to a barrage of publicity emanating from hearings conducted by Congressional committees, the gist of which was that drug companies generally were guilty of gouging the public. The record contains an extensive showing of the nature and effect of this publicity.*

For example, hearings in 1959 before the so-called Kefauver Subcommittee** resulted in headlines such as the following:

> "Drug Quiz Charges 1,118 per cent Mark-up" (1266a)
> "Senate Panel Cites Mark-up on Drugs Ranging to 7,079 per cent" (1266a)

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* *See, e.g.*, 5635-6278a.

** The Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary of the United States Senate under the chairmanship of the late Senator Estes Kefauver.

"Senate Probe Reveals 1000% Drug Mark-Up" (5657a 5658a, 5660a, 5662a)
"7000 P.C. Mark-Up Charged in Drugs" (5668-70a).

These "mark-ups" (which were reached by ignoring the greater part of the companies' costs) did not relate to antibiotics or to the prices of any of the defendants, but the stories were generalized to apply to the whole drug industry. In subsequent hearings, the Kefauver Subcommittee turned to the subject of antibiotics. The resulting publicity was extensive (5825-35a). During the years which followed, this harmful publicity did not abate (5836-55a).

Shortly before the beginning of the trial, other hearings were held by the House Committee on Activities of Regulatory Agencies and by the Senate Finance Committee. Both of these involved charges of "high" drug prices, including prices of tetracycline (5647-48a).

The campaign was even carried on during the trial. Over Pfizer's protest, a Subcommittee of the Senate Select Committee on Small Business conducted hearings on drug prices including the prices of tetracycline and other broad spectrum antibiotics. The most highly publicized of these hearings occurred on the last day on which evidence was taken in this trial (5504-29a).

These hearings during the trial resulted in much publicity adverse to the drug industry, as is evidenced by headlines such as the following:

"Panel Hears Aged Face Choice Between Buying Food or Drugs" (6114a)
"Fight Against High-Price Prescription Drugs" (6092a)
"60% of Rx Drug Bill Called Unnecessary" (6135a).

On the evening before the jury retired to deliberate in this case, a cartoon appeared in the *New York Post* depicting pharmaceutical houses as profiteers shaking down pur-

chasers of brand-named drugs and captioned: "Surely you've heard of the instructions to 'shake well before using.'" (5628-29a).

The inflammatory nature of this campaign against drug pricing is obvious, and was the subject of affirmative proof. Shortly after the first Kefauver hearings, *The Washington Star* reported the findings of a national public opinion poll that most Americans thought the government should take action to control prescription drug prices (5764a). Even more significant findings resulted from a public opinion poll taken by Roper Research Associates, Inc. (6279-323a). This poll was taken at Pfizer's instance for use on post-trial motions in this case. It was based upon interviews with a scientifically selected sample of the population from which the jury was drawn. The poll showed that an overwhelming majority of people believed drug prices and profits were unreasonably high. The Roper poll further demonstrated that, in popular opinion, the selling price of prescription drugs ought to be only modestly above bare production cost. Eighty-eight percent of the sample believed that if bare production cost was $3.00 an ultimate selling price of $10.00 would be "excessively high" (6285-86a, 6296a).

3. The Government's Use of the Materials on Costs and Profits Was Prejudicial.

Throughout the case the government placed major emphasis on the charge that the defendants' prices and profits were unreasonable, and this emphasis tended to obscure the fact that the crime charged was conspiracy.

In the indictment itself, while the charge of conspiracy is made in very few words, the draftsmen found at least fifteen places where reference could be made to "unreasonably high" prices or profits (Ind. ¶¶ 37, 42, 46(j) 46(k), 47(a), 47(b), 47(c), 47(d), 47(e), 49, 52, 53, 55, 57, 58;

31-32a, 34-40a). The Justice Department's preoccupation with questions as to the fairness of prices carried over into its public accouncement of the indictment. Although there was reference to the charge of conspiracy in the text of the announcement, the topic sentence which set the tone of the whole announcement was:

> "Three of the nation's largest manufacturers of antibiotic 'wonder' drugs were indicted today *on charges of maintaining unreasonably high and non-competitive prices* and monopolizing the production and distribution of the drugs since November, 1953" (314a) (emphasis supplied).

At an early stage of the case, the defendants moved that the allegations concerning "unreasonably high" prices and profits be stricken from the indictment as surplusage so that the invitation to go into the fairness of defendants' prices would not be tendered to the jury (303-05a). This motion was denied (356-60a, 217 F. Supp. 199).

Throughout the trial government counsel hammered away at a comparison between production costs and selling prices, and even made matters worse by constant references to the selling prices of retailers which were, of course, much higher than the prices at which any defendant ever sold.

The following passage from the government's opening to the jury shows how this theme was developed.

> "In 1954, it cost Cyanamid $2.55 to produce 100 capsules, 250 milligrams each of tetracycline.
>
> "In 1956 it cost them $1.76.
>
> "In 1958 it cost them $1.59.
>
> "They were selling to the druggist at $30.60 and the consumer was paying $51 for it.
>
> "In 1954, Pfizer's production costs were $3.87. In 1956 it was $3.08. In 1958 it was $3.24 and in 1960 it dropped to $1.70. The price to the druggist was $30.60. I am talking now of the entire period for all these companies. The price to the consumer, $51.

"The price to Bristol in the beginning was high. It was $9.01 in November of 1954. In 1956 it was $1.98. In 1958 it dropped to $1.91 and in 1960 it dropped to $1.62. The price to the consumer, $51. The price to the druggist, $30.60 during the entire period, the same price.

"The price to Upjohn, the cost to Upjohn, rather, $12 in 1954. $9.86 in 1956. $9.39 in 1958. $7.98 in 1960. The price to the druggist, $30.60. The price to the consumer, $51.

"Note the difference. Cyanamid's cost, $2.55. Upjohn's, $12 and something. The same price by both parties.

"Now, to finish it out, Squibb in 1958, cost $9.58. In 1960 $7.71 cost. Price $30.60 to the druggist. $51 to the consumer. Same price during the entire period.

"What does that mean? Squibb and Upjohn, high-cost producers, were able to make a fair, normal profit under a price schedule, a fixed price schedule we say, which returned enormous profits to the other three companies and particularly enormous profits to Pfizer and Cyanamid, which were big in the package market, and huge bulk profit to Bristol, which was engaged in selling bulk to Squibb and Upjohn." (1497-98a)

The defendants moved for a mistrial at the close of the government's opening on the ground that it invited the jury to base a verdict on its view of whether prices and profits were fair and reasonable, but the court denied the motion (1506-08a).

In the summations to the jury government counsel similarly stressed the claim of "unreasonably high" prices and profits, using the same kinds of evidence (4833-37a, 4847-48a, 4850-54a, 4862a, 4906a, 4909a).

The following are a few examples of the way in which prices and profits were used in the summation:

"Do you know what flows from that then? That when the prices are as high as they are here compared to

production cost, *then the profits that flow from those prices are unreasonably high profits.*" (4847a)

• • • • •

"In 1954 it cost Cyanamid $2.26, in 1955 it cost them $1.57. That listed for $51. The druggist paid $30.60. *2,000 percent markup.* Pfizer, $3.87, selling it to the druggist at $30.60, *roughly nine times as much.* In 1960 it is down to $1.70, and there we have *about 18 times as much.* There is Bristol, in 1956, $1.98, selling for $30.60. $1.67 in 1957 selling for $30.60. $6.24 in 1954, selling for $30.60." (4851a)

• • • • •

"I think it is a fair inference from this chart that Cyanamid and Pfizer and Bristol starting in 1956 *were making an unreasonably high profit.* I don't think there is much doubt about that." (4852a)

• • • • •

"you have seen what the costs were, you have seen *the unreasonably high profits involved. . . .*" (4854a)

• • • • •

"it was up to Pfizer . . . to continue maintaining prices at *these profits* that I have already shown you." (4862a) (emphasis supplied in each instance)

These were not logical arguments giving reasons why the defendants' prices would have been reduced in the absence of conspiracy. They rather stressed, as a fact in itself, the claimed unreasonableness of profits basing the claim upon evidence which could not possibly show the levels of profits at which any of the defendants sold any of their broad spectrum antibiotic products.

Although the Court of Appeals did not decide the question of admissibility of the evidence as to costs and profits, the use made of such evidence in this case should be considered in the light of the general rule that highly prejudicial evidence should not be admitted when its probative value is limited. This rule is stated by McCormick, who

lays down "several counterbalancing factors which may move the court to exclude relevant circumstantial evidence if they outweigh its probative value." The first two "in order of their importance" are peculiarly applicable here:

> "First, the danger that the facts offered may unduly arouse the jury's emotions of prejudice, hostility or sympathy. Second, the probability that the proof and the answering evidence that it provokes may create a side issue that will unduly distract the jury from the main issues." (McCormick, *Evidence* 319 (1954))*

Such considerations should surely have led the trial court to take effective action to prevent the use of the evidence as an appeal to emotion. This, unfortunately, was not accomplished.

4. The Trial Court's Instructions Permitted, and Perhaps Encouraged, the Jury to Decide the Case on Their Views as to the Fairness of the Defendants' Prices and Profits.

The true issue in the case was whether the defendants had conspired as alleged in the indictment. The question whether their prices and profits were too high had no direct bearing on this issue. Moreover the case was tried in an atmosphere which was not conducive to rational and proper evaluation of the evidence as to costs and profits. This

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* See *Herman Schwabe, Inc.* v. *United Shoe Mach. Corp.*, 297 F.2d 906, 912 (2d Cir.), *cert. denied*, 369 U. S. 865 (1962); *International Shoe Mach. Corp.* v. *United Shoe Mach. Corp.*, 315 F.2d 449, 459 (1st Cir.), *cert. denied*, 375 U. S. 820 (1963); *United States* v. *Mullings*, 364 F.2d 173 (2d Cir. 1966); *Monticello Tobacco Co.* v. *American Tobacco Co.*, 197 F.2d 629, 633 (2d Cir.), *cert. denied*, 344 U. S. 875 (1952); *Hartman* v. *United States*, 215 F.2d 386, 391, 394 (8th Cir. 1954); *Frank* v. *United States*, 262 F.2d 695, 696-97 (D.C. Cir. 1958). *See also Pevely Dairy Co.* v. *United States*, 178 F.2d 363, 371 (8th Cir. 1949), *cert. denied*, 339 U. S. 942 (1950); 1 Wharton, *Criminal Evidence* § 166 at 321, n.4 (12th ed. 1955). *Cf. Shepard* v. *United States*, 290 U. S. 96 (1933).

atmosphere had been created, and was added to during the trial, by the widely publicized assertions of governmental representatives as to the unfairness of drug pricing generally and of antibiotics in particular.

For these reasons, if the evidence was to be in the case at all, it was necessary that great care be taken to guide the jury in their consideration of this evidence and to guard against its misuse. The Court of Appeals concluded, from its study of the whole charge and the whole record, that the proper precautions were not taken and that the jury's attention was diverted from the real issues to the question whether prices were unreasonably high.

The court began the trial with a preliminary admonition to the jury, which constituted their introduction to the case. The defendants asked the court not to refer in its admonition to characterizations such as "unreasonably high" as applied to prices (1296a). This request was not followed. The court described as one of the means and methods of the alleged conspiracy "the maintenance of identical noncompetitive and unreasonably high prices in its tetracycline products", and also summarized the alleged effects of the conspiracy as including "the creation of uniform non-competitive and unreasonably high prices to the users of broad spectrum antibiotics . . . ." (1468a).

The admonition did not give the jury any guidance as to the possible relevance of the "unreasonableness" of the defendants' prices and profits. It merely told the jury that one of the things involved in the case was a claim of unreasonably high prices. This admonition set the stage for government counsel's emphatic use of the charge that prices and profits were unreasonably high in the opening statement to the jury, throughout the trial and in the summation.

The charge to the jury on this subject started with proper instructions to the general effect that the jury was not to

be influenced "by any notion that drug prices were too high or too low or even just right" (4994a). The effect of this advice was seriously impaired, however, by further instructions on the subject.

The court suggested that the jury weigh the question of reasonableness in terms of certain new definitions, saying:

> "In the light of what I have just said, I think you will find it helpful to translate the word 'unreasonable' to mean 'unusual' or 'artificial' or 'extraordinary.' By these suggested definitions I am trying to convey the thought that the idea of unreasonableness in the present context is meaningful only if it is understood to refer to kinds of price behavior or price levels which appear to be divorced from variations and differences in available supply or demand or cost or other economic factors that may normally be expected to cause variations or changes in the prices charged in a competitive market.
>
> "To put the thought in another and slightly shorter way, the charge of unreasonableness in this case is material only insofar as it poses the issue whether the prices involved exhibit qualities or peculiarities of a type that could be deemed evidence that such prices resulted from agreement rather than from competition" (4994-95a).

There are at least three reasons why these new definitions failed to accomplish the court's purpose.

First, the jury was given no basis for deciding what these new words meant in the context of this case. To know what was "unusual" or "artificial" or "extraordinary" the jury would have to know what was usual, unartificial or ordinary in the pricing and marketing of comparable prescription drugs. The court gave the jury no guidance on this point, and did not refer to the evidence indicating that in the circumstances of this case there were no economic reasons why any defendant could have expected to benefit by a list price reduction in the prescription market.

Second, the charge allowed the jury to focus on the cost evidence, including the evidence of production costs, and to apply as a model for comparison, perhaps standards drawn from markets with many sellers, no patent barriers, no anti-substitution laws and elastic demand, standards completely inapplicable to the broad spectrum antibiotic market. The court mentioned certain economic factors which in its view might "normally be expected to cause variations or changes in the prices charged in a competitive market" (4994a), but did not refer to any factors (which were shown in the evidence), that might normally be expected to militate against variations or changes in prices.

Third, the definitions came after several weeks of trial and after the government's summation, in which the question of the fairness or reasonableness of prices and profits was continually presented as a relevant consideration and was stressed in terms of a fictitious "profit" over bare manufacturing cost.* Nothing had been done at any stage of the trial to inform the jurors that the question of fairness was not before them or to give them the definitions quoted above.

The crucial importance of the question whether the jury was able to apply the definition of "reasonableness" given them at the end of the trial is clear when one considers the emphasis given by the court to the significance of unreasonable prices and profits. The jurors were told that "unreasonably or extraordinarily high prices or profits charged uniformly by competing sellers over a substantial period of time" may be evidence supporting an inference of conspiracy (4998a). Almost immediately after this they were

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* These special definitions were ineffective to prevent the jury from accepting the improper comparisons relied upon by the government between bare production costs and selling prices. For, although the court referred to the fact that other costs should be taken into account in computing net profits, it expressly allowed the jury to consider relationships between production costs and defendants' prices in considering the conspiracy issue (4996-99a).

told that "unreasonably high profits" were relevant to the issue of conspiracy to monopolize and actual monopolization (4998a). This gave special emphasis to the claim of unreasonably high prices and profits.

During the whole trial the assertion that prices and profits were too high had been put before the jury without any special definitions so that the jurors were left to consider the evidence in the light of their subjective views as to the fairness of prices and profits. Asking them to switch mental gears at the end of the trial and to give the terms "unreasonably high prices" and "unreasonably high profits" a new meaning not used in ordinary parlance and different from the meaning used throughout the trial was asking too much.

The entire charge on costs and profits was objected to by the defendants but the court refused to make any corrections in it (5026-27a, 5028-31a, 5038-41a, 5042-45a, 5291-96a, 5297-303a).

In a criminal case particularly, defendants are entitled to clear and lucid instructions on important points, not confusing ones. The test is "whether the instructions were sufficiently clear and whether it was reasonably possible for the jury to follow them." *Delli Paoli* v. *United States*, 352 U. S. 232, 239 (1957), *overruled on other grounds*, *Bruton* v. *United States*, 391 U. S. 123, 126 (1968). What is required is:

> "an explicit, *unambiguous* statement of the issue of fact to be decided by the jury, supplemented by a brief description of the rules of law, intended for the guidance of the jury . . . all in words readily *understood by laymen*, without the confusion of digressions and the unnecessary use of legal jargon." *United States* v. *Christmann*, 298 F.2d 651, 653 (2d Cir. 1962) (emphasis supplied).

See also Bollenbach v. *United States*, 326 U. S. 607, 612 (1946).

The defendants were entitled to have a trial in which the jury would be kept as far away as humanly possible from the unconstitutionally vague question whether prices were "unfairly high." The Court of Appeals was correct in concluding, in light of the pattern of the whole trial, that this was not accomplished.

B. The Jury Might Have Been Diverted from the True Issues of the Case by the Government's Allegations that Pfizer Committed a Fraud on the Patent Office.

Most of the government's evidence about Patent Office matters related to Pfizer's successful *ex parte* efforts in the fall of 1954 to have a patent on tetracycline issued to it (*See, e.g.,* 3889-4410a). Through this evidence the government was attempting to prove that Pfizer had obtained the patent by fraud.

Pfizer continues to assert that the charge of fraud was unfounded. Before the Court of Appeals a full showing was made of the company's position that there was no misconduct in the prosecution of its application for a patent on tetracycline. That court did not reach the question of the sufficiency of the evidence to establish fraud, and based its decision on other grounds. Accordingly, we will not lengthen this brief by discussing this complex and sharply contested issue, and will address ourselves only to points decided by the Court of Appeals.

A primary effort by the government was to prove the charge in the indictment that fraud on the Patent Office was an agreed means by which the alleged conspiracy was effectuated. Late in the trial, however, government counsel conceded that no evidence of conspiracy to defraud had been produced, saying:

> "If we could show a conspiracy to defraud the Patent Office that would be fine and maybe some-

thing will come up that will show it. I don't know" (4135a).

Nothing did come up to show it, and in this state of the record Pfizer's motion to strike the evidence should have been granted (4485-515a, 5316-39a, 5477-88a).

Nor was Pfizer's conduct of the *ex parte* proceedings in the Patent Office probative of the alleged conspiracy to exclude competitors or to fix prices. The proceedings in question were secret, and remained so until the patent issued. No other company had any involvement in these proceedings and there is no evidence that any of them had any knowledge thereof. In this setting, Pfizer's conduct in the proceedings did not tend to indicate the existence of any conspiracy. Pfizer had an obvious and independent interest in obtaining a patent, and the nature and quality of its acts directed to that end do not signify anything as to its relations with other companies.

Apart from the lack of probative value, the evidence was diversionary because of its extremely technical nature and was prejudicial because of the very nature of a charge of fraud.

This evidence involved lengthy inquiries concerning a wide variety of arcane subjects, including, *inter alia:*

—how motion practice is conducted in patent inferences;

—how rejections by patent examiners are made and what they are and can be based upon;

—what is involved in the concept of "prior art" as it is known in the patent field;

—the meaning and significance of pH in fermentation processes;

—the relative efficacy of the Pidacks, Craig countercurrent, Florosil, and paper chromatography techniques;

—what is meant by a recovery procedure in microbiological circles;

—the significance of mutations among strains of *Streptomyces aureofaciens*;

—how potency is measured in fermentation broths;

—the interrelationships between concurrent prosecutions of complicated patent applications; and

—many other similarly technical subjects.

The best demonstration of the inflammatory nature of the accusation is in the use actually made of it in the prosecution's summation. Government counsel explained to the jury why he intended to go fully into this subject saying:

> "Well, I shall take a little time to go into some detail; since it reflects upon the personnel involved in some way, it must reflect the charges are misleading and withholding information before the Patent Office and anyone guilty of that certainly has a reflection cast on them and therefore I think I shall go into a little detail." (4883a)

The Patent Office evidence was such a big and complex case in itself that even without any claim of fraud it might well have distracted the jury from the true issues in this case. When to this is added the fact that the prosecution stressed the evidence because of the "reflection" cast upon the persons involved, it seems clear that the Court of Appeals was right in saying that the case was "virtually diverted from an antitrust conspiracy case to a patent fraud case" (12599a, 426 F. 2d at 41).

Because of the conceded failure of the government's attempt to prove conspiracy to defraud the Patent Office and because of the lack of probative significance in the evidence as to Pfizer's proceedings in the Patent Office, this matter should not have been submitted to the jury at all. It was submitted quite fully, however. The overall effect of this part of the case was included in the Court of Appeals' statement that the evidence

> "could well have so prejudiced the jury that it either failed to resolve the primary issue or subordinated

it to the issues stressed. Because of this real possibility, defendants Pfizer, Bristol and Cyanamid are entitled to a new trial" (12602a, 426 F. 2d, at 43).

IV

The Trial Court's Errors with Respect to Bristol's Alleged Conspiracy with Pfizer and Cyanamid.

The Court of Appeals found that the trial court committed two basic errors with respect to the evidence as to Bristol's alleged entry into conspiracy with Pfizer and Cyanamid. First, the charge of the court relating to the licensing agreements made by Pfizer with Bristol, Squibb and Upjohn improperly characterized them as restrictions on Squibb and Upjohn, and virtually directed a finding of conspiracy between Pfizer and Bristol. Second, the trial court seriously undercut a major part of the defense case by refusing defendants' requests to charge concerning the significance of the conduct of Pfizer and Cyanamid before November 1953 (5151-52a, 5536a) and the conduct of Bristol prior to December 1955 (5195-96a, 5587-88a) and by cutting the jury free from any temporal restrictions (4963-64a). These points are covered in greater detail in the brief submitted by Bristol, and there is no need for repetition. Here we merely emphasize that these errors were prejudicial to Pfizer.

These errors tended to move the jury towards a finding that Pfizer conspired with Bristol. They therefore were adverse to both these companies. Moreover, a finding of conspiracy as between Pfizer and Bristol would, as a practical matter, have made it substantially easier for the jury to take the further step of finding conspiracy between Pfizer and Cyanamid. Accordingly, any errors relating to Bristol's alleged entry into conspiracy with Pfizer were as prejudicial to the other defendants as to Bristol.

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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December 15, 1971